CASES
ARGUED AND DETERMINED
IN THE
Supreme Court
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT...MAY TERM, 1830.

Eastern District.
May, 1830.

MALPICA
vs.
McKOWN & AL.

MALPICA vs. McKOWN & AL.

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Where the laws of the place where the owner resides, and that of the country where the contract of affreightment is entered into, and to be fulfilled, differ, the latter governs.

Foreign laws must be proved like other facts; but where the country now foreign, once made a part of the same empire with that in which the proof is to be administered, the laws common to both, at the time of separation, do not require proof in either, and they will be presumed to remain the same unless the contrary is proved.

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But he is, if it is known to him after the passenger's death, and he does not take care of it.

The value of the vessel does not furnish the measure of responsibility.

It is the duty of the Captain of a vessel, to take charge of the effects of a passenger who dies on board.

APPEAL from the court of the parish and city of New Orleans.

The petition stated that Malpica embarked at Vera Cruz on board the ship Belle, McKown master, where he died, leaving money and effects to the amount of $7387.—The petition averred the liability of both master and owner, and prayed judgment against them in *solido*.

Curell in his answer admitted the ownership of the vessel, and set up the following grounds of defence. That, on the voyage a mutiny broke out among the passengers, and the command of the ship was forcibly taken from the Captain. That, if the deceased Malpica, had money and effects on board, they never came into the possession of respondent who was in New Orleans, or into that of any of his authorized agents, but that the same was taken possession of by the friends of Malpica, or by the mutinous passengers. That, if any

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loss was sustained by the heirs of Malpica, it was caused by the act of those over whom, respondent had no control. That the ship carried no freight, nor was freight chargeable for any effects in the possession of the passengers.

It appeared from the evidence that on the 5th day out, Malpica died. That an inventory was taken of his effects, and the money counted in the presence of the captain, who took charge of his trunk, and delivered the money to one Subietta, a passenger on board. The ship was bound from Vera Cruz to Havana, with about 150 passengers, without freight or cargo. After being at sea about 30 days, the passengers were put on short allowance. A few days afterwards, they (the passengers) put a watch over the provisions and water, and requested the captain to make the first land. Two days afterwards, the vessel reached a small port on the Spanish main, where most of the passengers debarked, among whom, was Subietta, but there was no evidence that he carried the money with him. One witness testified that he returned it to the captain. It further appeared, that when the ship left Vera Cruz, the captain had no notice of any money being on board, nor did he

sign any bills of lading. There was judgment for the plaintiffs in the court below, and the defendant appealed.

Eustis and *Dennis*, for appellee.

The owner of a vessel is liable for the acts of the Captain.

Duncan, contra.

The law of the case is with the defendant. C. C. 2263, 2266, 2299. Palfrey *vs.* Kerr, 8 Mart. n. s. Par dessus cours de droit com. vol. 3, p. 98. Boyce *vs* Anderson, 2 Peter's Rep. 150.

PORTER J. delivered the opinion of the court. This action is instituted to receive from McKown, captain, and Cunell, owner of the ship Belle, the sum of $7378, which the petition alleges, the deceased, a passenger in the vessel aforesaid, brought on board of her, on a voyage from *Vera Cruz to Havana*, and which, it further alleges, the defendants refused to deliver, though requested to do so.

The proceedings against the captain, appear to have proceeded no further, than to

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bring him into court. Against Curell, they have been carried on to final judgment. The latter in his answer, acknowledges the ownership of the vessel, and the voyage, but alleges, that during its progress, a mutiny broke out on board, and that the passengers taking the control of the ship, compelled the captain to land them on the Spanish main. It avers the defendant is not responsible for the money and effects of the passenger who died, because they were taken possession of by the friends of the deceased, or by the mutinous passengers, and it further affirms, that, if the property did not come into the hands of the captain, officers or crew of the vessel, the defendant is not responsible.

The court below, after hearing a great deal of contradictory testimony, gave judgment against the defendant for $6862, from which judgment he appealed.

Without noticing the evidence in detail, its discrepancies, and the reasons which induce us to come to the conclusion we are about to state, we think it establishes: that, the deceased Malpica came on board the ship Belle, at Vera Cruz, as a passenger to Havana, and brought on board with him, a sum of money,

equal in amount to that, for which the inferior court gave judgment; that no freight was paid for it, nor any notice it formed part of his effects, communicated to the captain.—That after the vessel was out some days, Malpica died; that an inventory was made of his effects and property, in which the money was included: that the captain assisted at the counting of the money, but refused to sign the inventory; that he took possession of the trunk, and placed the money in the care of another passenger, who did not take it with him when he debarked on the Spanish main.—That, there was no mutiny on board, nor any act of the passengers which prevented the captain discharging all obligations imposed on him by law, as commander of the vessel, in relation to property, situated as this was. And finally, that the evidence furnishes a strong presumption the captain converted the money to his own use.

On these facts the plaintiff contends the owner is responsible for the acts of the master, and he has especially relied in support of this position on the commercial laws of Spain, the places where the voyage commenced and was to terminate, being in countries governed by these laws.

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The defendant resists the application of the laws of Spain to the case, on two grounds. *First*, that the laws of the place where the ship is owned, must determine the responsibility of the defendants. *Second*, that there is no evidence on record of the laws of *Vera Cruz* and *Havana*, and consequently, the court must presume it to be the same as our own.

And as to the first point, we are of opinion, that the law of the place of the contract, and not that of the owner's residence, must be the rule by which his obligations are to be ascertained. The *lex loci contractus* governs all agreements, unless expressly excluded, or the performance is to be in another country, where different regulations prevail. What we do by another, we do by ourselves, and we are unable to distinguish between the responsibility created by the owner, sending his agent to contract in another country, and that produced by going there and contracting himself.

The owner of the vessel is responsible for the acts of the master within the scope of his employment, even for his torts.

The second offers rather more difficulty. The general rule, certainly is, that courts cannot notice the laws of a foreign state, unless they be proved like other facts. But when countries have once belonged to the same

government, and the same rules prevailed in both, it is not understood by us that the separation of the countries, renders the laws in existence, at the time they divide, foreign to each other. The act of political separation does not destroy the knowledge possessed in both, that they were subject to the same law, and what that law was. Any change made in it after the countries became independent of each other; any new statute passed in either, would certainly come under the general rule. Because it was at no time common to both. But those laws which were, stand on quite a different footing. The rule, like every other in regard to evidence, is founded on good sense. Courts require proof of the laws of another country, because they do not judicially possess the means of knowing them.—But when they do possess judicial knowledge of them, there seems no object in requiring evidence of that, which is already known. We have looked into the jurisprudence on this head, and we do not discover that the different States in the Union require proof the common law prevails in each. Or that it has ever been deemed necessary to establish by testimony, that the same system governs in England.

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Where the law of the place where the owner resides, and that of the country where the contract of affreightment was entered into, and to be fulfilled, differs, the latter governs.

Foreign laws must be proved like other facts, but where the country, now foreign, once made a part of the same empire with that in which the proof is to be administered, the laws common to both at the time of separation do not require proof in either, and they will be presumed to remain the same unless the contrary be proved.

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It is true, they require proof of British statutes, which never were in force within their own state, but this is in the distinction already alluded to. It is a matter of history, that certain countries formed part of the same kingdom or government, of which, courts of justice take notice, without evidence; and if it be a fact that the countries separated were at one time under the same government, proof of the law at the time of separation is vain, and of no use; for the court knows its own law, which was the law of both.

We therefore think the laws of Spain may be referred to, and considered in the decision of the cause, although they have not been proved as facts.

It is the duty of the captain of a vessel to take care of the effects of a passenger who dies on board.

By one of the laws of the Indies it is made the duty of the master of a vessel, in case any of the passengers die during the voyage, to make an inventory of their property, and deliver it at the port of destination. *Jacobson*, in his sea laws, without referring to any special legislation as authority, declares it to be the duty of the captain to do so. It would seem to us to necessarily result from the duties which masters of vessels have to perform; and its importance cannot be doubted. The

valuable effects with which men frequently travel, and the unprotected state of their personal property on board a ship, after their deaths, render it necessary that some one should be responsible for its safe keeping. Numerous frauds would otherwise follow. On no one can this duty be so properly imposed, as the captain of the ship, whose situation and authority enable him effectually to discharge it. The present instance presents a case where this duty has been totally neglected. The master either converted the money to his own use, or permitted others to do it, without taking any measures to prevent them, and in either hypothesis, his responsibility is the same. *Curia Phillip. lib.* 3, *cap.* 11, *No.* 13, *Jacobson Sea Laws*, 133.

Our attention has been most turned to that part of the defence which claims immunity for the captain, in consequence of the passenger bringing the money on board without giving notice of it.

Whether the captain is responsible for money in a trunk, of which no declaration is made when brought on board? *Quere*—but he is, if it is

We have endeavored, but fruitlessly, to satisfy ourselves, whether the master and owner are responsible for money or precious objects placed among the baggage of a passenger, and of which no particular declara-

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tion is made. The *Consulato del Mare* and the *laws of Wisly*, both treat of the effect of this concealment, on a claim for average, if the objects have been thrown overboard, but they are silent as to the responsibility of the captain in other cases. A law of the Partidas, renders the owner responsible for every thing which is brought on board with the knowledge of the master; but whether the delivery of a trunk or parcel, without a declaration of its contents, would produce responsibility in the case supposed, the law is silent. It is probable it would. No exception is made, and even where the traveller is received through friendship, by carriers on land and water, or keepers of inns, this law makes them responsible for his effects, unless they receive them with an express declaration that the traveller must take care of his own property. *Peters Reports, vol.* 1, *appendix, p.* 20, *and* 82; *Consulat de la Mer par Boucher, vol.* 2, *page* 451, *nos.* 855 *a* 860. *Partidas* 5, *lib.* 8, *law* 26.

known to him after the passenger's death, and he does not take care of it.

The value of the vessel does not furnish the measure of responsibility.

But whether the master would have been resposible in case the money had been lost before the death of the owner, need not be enquired into. On that event taking place,

the knowledge of the property being on board was brought home to him. He became by law the guardian of it, and it was his duty to take it into his possession and deliver it to the representatives of the deceased. We find nothing in the law, and we see no good reason why, on the death of a passenger, the captain should be discharged from all responsibility in relation to his effects, because he was not made acquainted with their kind and value previous to the proprietor's decease.

The responsibility incurred by the master in this case, of which we have no doubt, settles the question as to the owners. The general principle in this matter is so well established, as to be familiar. The proprietor of the vessel is answerable for all acts of the master within the scope of his employment, even for his torts. *Abbott on Shipping*, 99, *ed.* 1829; 3 *Kent's Comm.* 162; *Curia Phillip, lib* 3, *cap.* 12; *Verbo Danos, No.* 29; 6 *John.* 160, 11 *ibid*, 107; 10 *ibid.*

Counsel have endeavoured to limit the responsibility of the defendant to the value of the vessel and freight earned. Such a limitation does exist in several countries, and it is wise, perhaps that it should. But the general law is

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otherwise, and the very passage of special statutes limiting the responsibility, acknowledges the previous rule to be otherwise. No such statutory provision is shown to exist in the country where the contract was made, and we cannot supply it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

SUAREZ vs. DURALDE.

In a contract to build, when a plan is furnished and referred to in the contract, the undertaker is governed by the plan.

A plea in reconvention, need not be answered in writing.

An architect may be examined, as to the usage of the trade, under a contract to build; but he cannot give his opinion as to the construction of the contract.

APPEAL from the court of the parish and city of New-Orleans.

The plaintiff, a master workman, having contracted to build for the defendant, brought this suit to recover the balance of the price agreed upon; and a further sum, for extra and additional work done upon the premises.

The defendant denied being indebted in any manner to the plaintiff, or that any work was done upon the premises not contemplated by the contract; and further, that by reason of the plaintiff's non-compliance with his engagement, he had sustained heavy damages, which he claimed in reconvention.

It appeared from the contract, entered into on the 21st day of December, 1827, that the plaintiff undertook to erect for the defendant two brick buildings, of the extent, depth and front, as designated on a plan signed by both parties and referred to in the contract. On this *plan* the back buildings were described, but no allusion was made to them in the contract. The plaintiff erected back buildings, which were proved to be worth two thousand five hundred dollars.

The front buildings were to be completed and delivered on the 1st day of May, 1828.—They were not delivered until October, and then in an unfinished state. The city surveyor and a number of architects examined the buildings, and pronounced them defective. To put them in tenantable repair, Brand, a master workman, estimated the cost at one thousand eight hundred and eighty dollars. There was

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judgment for the defendant for one thousand four hundred dollars, and the plaintiff appealed.

Conrad for appellant.

1. The court *a quo* erred, in allowing witnesses to be examined on the meaning and interpretation of the contract.

2. The verdict of the jury, was clearly contrary to the evidence of the case and to law.

PORTER, J. delivered the opinion of the court. The plaintiff contracted with the defendant to build for him two houses, and brings this action for the balance of the price agreed on, as well as for the value of additional work done. The defendant avers, that the buildings were not erected according to contract, and denies the fact of any thing, not included in the original agreement, being executed by the plaintiff. The answer concludes by a prayer in reconvention.

The cause was submitted to a jury in the court below, who found a verdict in favor of the defendant for one thousand four hundred dollars, which was confirmed, notwithstanding an effort on the part of the plaintiff to obtain a new trial. He appealed.

From the pleadings, as already noticed, it appears, that the matters in dispute between the parties, were first, whether any part of the work done by the plaintiff was exclusive of the written contract, and second, whether that part of it which is confessedly within the agreement was faithfully and properly executed.

For a proper understanding of the first question, reference must be had to the original contract, which was reduced to writing: by it, the plaintiff contracted to build "*two houses in brick, each of two stories in height, of the extent, and depth, and form, designated in the plan agreed by the parties, and identified with these presents by the signature of both.*" In another part of the contract it is stated, that the buildings are to be so completed, that "*on his, the said Suarez, at the time prefixed, handing the key to the said Duralde, the latter may be enabled forthwith to enter, occupy or lease, each building, without any thing more necessary being to be done to either of said buildings, inclosures, or yards.*"

On the plan thus made, a part of the contract, back buildings, embracing a kitchen

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and servants' rooms, are marked as annexed to the main edifice. But in the description of the manner in which the house should be erected, the size of the rooms, the placing of dormant windows, &c. nothing is said which can be considered as applicable to the back buildings; on the contrary, every thing specified in relation to the mode in which the work was to be performed, applies exclusively to the front, or main edifice.

Testimony was offered and received from a number of master workmen, to shew how they would understand such a contract.—Some swore they would consider themselves bound to perform the work, according to the plan. Others said, they would not. The jury, by their verdict, seem to have adopted the interpretation of the former, and there can be no doubt they decided correctly. The plan, when referred to, and incorporated with the written contract, *made a part of it*, and the plaintiff, in agreeing to build a house according to that plan, was as fully bound to build every thing specified in it, as if he had expressed his engagement in words. The failure to state how such work was to be performed, cannot discharge him from his obli-

In a contract to build, when a plan is furnished and referred to in the contract, the undertaker is governed by the plan.

gation. As that part of the building was destined for servants' rooms and a kitchen, which in general do not require any thing particular in their construction, the presumption is, the parties understood they were to be put up in the ordinary way. But be the reasons what they may, for nothing being said in relation to this part of the edifice, on no rule of construction can the omission to express, in a contract, how work is to be done, release the party who has engaged to do that work, from a performance of it. By one of the rules for the interpretation of agreements, given in the Code, it is enacted that "when the intent of the parties is doubtful, the construction put on it by the manner in which it is executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation." In this instance, the plaintiff erected the back building without ever stating to the defendant, that it was not included in the original agreement. Such conduct, on his part, would present a formidable objection to the interpretation he now gives to the contract, if its terms were doubtful. But we do not consider them so. We think they

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clearly embraced every thing specified in the plan. *Louisiana Code*, 1951.

A plea in reconvention need not be answered in writing.

It has been argued in this court, that the cause was tried without issue being joined; no answer having been put in to the demand in reconvention. But it has not been the practice in our courts, so far as it has come under our notice, to answer such pleas in writing. They are considered to stand in the same way, as any other matter which is pleaded in avoidance: that is, denied. The 328th and 329th articles of the *Code of Practice*, sanctions this mode of proceeding. The first permits the defendant to allege new facts in his answer, and make an incidental demand; and the latter declares, that in such case they shall be considered as denied by the plaintiff.

An architect may be examined as to the usage of the trade under a contract to build, but he cannot give his opinion as to the construction of the contract.

In the court below, an objection was made to the introduction of architects and builders, to prove their understanding of the contract, and it has been renewed here, and much discussed. We think the evidence should not have been received. The witness might have been asked, what was the usage of the trade under such agreements, but he could not give his opinion as to the construction which

should be given to the writing. That was the province of the court and jury. But as we are satisfied the opinion given by the witness, was the construction which the law puts on the instrument, we cannot remand the cause on that ground.—*Douglass' Rep.* 527. *Starkie on Ev.* 1736, *in note.*

The plaintiff offered testimony, to prove that the work done was worth more than the price stipulated in the contract: his avowed object in offering it, was to show to the jury that his interpretation of the contract was correct. Believing as we do, the contract to be clear and unambiguous, we think such evidence was admissible.

We think the damages given by the jury are not too high, that they conform to the evidence, and it is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

TIETJEN vs. PENNIMAN.

Journeymen printers are laborers within the meaning of the Civil Code, art. 3499.

And their wages are prescribed by the lapse of one year.

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TIBTJEN vs PENNIMAN.

An amicable demand is still required, although the Code of Practice dispenses with a written one.

APPEAL from the court of the parish and city of New-Orleans.

This suit was brought on the 9th November, 1829, to recover fron the defendant the amount of wages due the plaintiff, as a journeyman printer, from July 1828 up to January 1829. The defendant plead the general issue, prescription and the want of an amicable demand.—There was judgment for the plaintiff, and the defendant appealed.

Roselius, for appellant; *Nixon*, for appellee.

MARTIN, J. delivered the opinion of the court. The plantiff claims wages as a journeyman printer. The general issue and prescription were pleaded The plaintiff had judgment and the defendant appealed.

Journeymen printers are labourers within the meaning of the Civil Code, art. 3499, and their wages are prescribed by the lapse of one year

His counsel has shown that the parish Judge disallowed the prescription of one year, under the *Civil Code*, 3499. We think the Judge erred; journeymen printers are labourers and workmen within the meaning of the article of the code invoked.

The Judge disallowed the plaintiff's claim for costs, it appearing that no amicable de-

mand was made, and the appellee's counsel has contended that the Code of Practice has dispensed with the demand in writing, and the act of 1828 has repealed the part of the act of 1813, under which a demand was necessary in writing or otherwise.

An amicable demand is still required, altho' the Code of Practice dispenses with a written one.

We think the parish Judge did not err; the proviso of the Code of Practice providing that an amicable demand is not necessary, is a negative, pregnant with the affirmative, that a parol demand is so.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and that the plaintiff recover from the defendant one hundred and twenty-eight dollars for fifty-six days work, from the 10th of November, 1828, to the 5th January, 1829, and that he pay costs in both courts.

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The master of a vessel who refuses to deliver goods, on other grounds than the non-payment of freight cannot avail himself of the want of a tender.

A shipper cannot be affected by the master taking on board other goods, the landing of which would expose the vessel to seizure and condemnation.

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APPEAL from the court of the parish and city of New Orleans.

The plaintiff shipped on board the schooner Voluntario, bound from Havana to Tampico, a quantity of goods, to be delivered there upon the arrival of the vessel. At the time of the shipment it was known to both parties that Tampico was in possession of the Spanish troops, but upon the arrival of the schooner off the bar of Tampico, it was ascertained that the place had been retaken by the Mexicans, and that the Spanish army was prisoners. Not daring to enter, the captain called a consultation of the freighters and passengers, when it was determined by a majority to proceed to New-Orleans. Upon the arrival of the vessel at the latter port, it was discovered that certain articles on board could not be landed without subjecting the vessel to seizure and condemnation. The plaintiff demanded his goods, and upon the captain refusing to deliver them, this suit was brought for damages. There was judgment for the plaintiff and the defendants appealed.

Dennis, for appellant, contended:

1. The defendants are not liable to be sued in the manner and form as stated in the peti-

tion, because the violation, if any, is merely a passive one, and occasioned by irresistible force. C. C. 1925, 1926, 1927, 1904, 1905, 1906, 1907 and 3213.

2. The freight could not be delivered, as the same would have been forfeited to the United States, with the vessel.

3. Demand of the same has never been made according to the laws of the land.

Pitot, for appellee.

PORTER, J. delivered the opinion of the court. During the late invasion of Mexico, from the Island of Cuba, the plaintiff, with several others, shipped goods at Havana on board a schooner, to be landed at Tampico. Arrived off the harbor of the latter place, they found the town in possession of the Mexicans, and the Spanish army prisoners. Not daring to land, the captain called the freighters and passengers on board to a consultation as to the best course to be pursued with the vessel. A majority of the passengers voted in favor of coming to New-Orleans instead of returning to Havana; upon which the captain bore away for this port.

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Arrived here, it was discovered that a part of the cargo, composed of rum, had been shipped in casks, which could not be landed in the United States without exposing the vessel and goods to seizure and condemnation. The plaintiff demanded his goods, and the captain refusing to deliver them, in consequence of the penalty to which he was exposed if he landed any part of his cargo, this action was brought, in which damages are demanded for the detention of the property.

The captain pleaded the general issue, and the owner in his answer denied any agreement on his part to land the goods in this port, though he acknowledged he was ready to do so if the laws of the United States permitted him. He averred further, that he had put in here in distress for want of water and provisions on his way back to Havana.

The answer concludes by an averment, that the defendant, in consequence of this suit, and the illegal sequestration of his vessel, has suffered damages to the amount of three thousand dollars, for which he sues in reconvention.

The court below gave judgment in favor of the plaintiff, for seven hundred and two dollars and the defendant appealed.

The first point made in this court is, that the suit is prematurely brought for damages, the defendants not having been put *en demeure* previous thereto.

The 1905 article of the *Louisiana Code*, provides as a means of putting a debtor in default, a demand in writing, or a verbal requisition in the presence of two witnesses or by the protest of a notary public. The evidence shows a compliance with these requisitions, and we are therefore of opinion this objection cannot be maintained.

The next ground of defence is, that by the 3213 article of our Code, the captain has a right to retain goods until the freight is paid or secured, and that neither was done, nor offered to be done by the plaintiff.

This article of the Code does not make a tender of money, or of security for freight, indispensable to a legal demand for the goods, or to a maintenance of an action for their non-delivery. It affords the captain or owner of a vessel a protection of which he may avail himself if he thinks proper, or

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which he may waive if he choose. If when the property is demanded, he places his refusal wholly distinct from the want of security for, or payment of the freight, he impliedly abandons all objection on that score. The tender in this case would have been entirely useless, as the difficulty which induced the captain and owner to refuse th delivery would have still existed, though the shipper had offered to pay the freight.

The master of a vessel, who refuses to deliver goods on other grounds than the non-payment of freight, cannot avail himself of the want of a tender.

On the merits, it appears by an averment in the petition, that when it was found the vessel could not enter into Tampico, it was agreed by the freighters and the captain, that the voyage should be changed, and that they would proceed to New-Orleans. The cause, therefore, must be considered in the same light as if the original destination of the vessel had been here: and our enquiry, is what would be the rights of the parties in such an hypothesis. And we apprehend that the contract of affreightment is not destroyed by the captain taking other goods on board, which exposes his vessel to seizure and condemnation. The shipper of goods, which could legally enter the port of destination, cannot be affected by other goods being on board, which ex-

A shipper cannot be affected by the master taking on board other goods, the landing of which could expose the

poses the owner of the vessel to hazard and loss if he complies with his contract. His is the fault, and he must bear the consequences.

vessel to seizure and condemnation.

It is is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

PATRON vs. SILVA & AL.

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

APPEAL from the court of the parish and city of New-Orleans.

This case and the three succeeding ones, differ from that immediately preceding in only one fact, viz. that the plaintiffs were the owners of the prohibited goods. The petition also contained an averment, that not being able to enter Tampico, the vessel proceeded to New-Orleans, agreeably to a written contract, entered into between the captain, owner, and freighters of said vessel. There was judgment for the plaintiff in the court below, and the defendants apppealed.

Dennis, for appellant.

Pitot, for appellee.

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PORTER, J. delivered the opinion of the court. This case differs from that just decided between Fernandez and the same defendants, in the important fact, that the goods of the plaintiff were those which, according to the laws of the United States, could not be landed within their limits without exposing them, and the vessel which brought them, to seizure and condemnation.

The petition contains an express averment, that on arriving off Tampico, the petitioner and the defendants agreed to come to the port of New-Orleans, agreeably to a written contract passed between the parties. That contract has been produced in evidence, and it appears, that on the captain calling the freighters together, to know from them whether they would return to Havana or proceed to New-Orleans, they, and the plaintiff among the rest, answered, that it was indifferent to them whether the vessel went to the one port or the other. It is questionable, whether this proof would be sufficient in itself to shew a consent to a change of voyage; but taken with the averment of the party himself, that it was so intended, there can be no doubt that we are

compelled to consider the voyage as changed by mutual consent. And this conclusion renders it unnecessary to examine, whether any evidence could destroy the effect of the judicial confession, which the petition contains.

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

The parties then stand before us in the same situation they would do, if they had contemplated originally a voyage from Havana to New-Orleans. In such case, there can be no doubt the goods could not be demanded here. For if the voyage is unlawful before it is commenced, the contract of affreightment is dissolved. So it is, if it becomes unlawful after. And there is no difference in principle, between a complete interdiction of commerce which prevents the vessel to enter, and a partial one in relation to the merchandize on board, which prevents it being landed. Besides, this is an action in damages for the non-delivery of the goods in New-Orleans. Now, what damages could the plaintiff have sustained, since the moment they were put on shore, they would have been seized for a violation of our revenue laws.

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PATRON vs. SILVA & AL.

It will be seen, from these observations, that in our judgment the whole case turns on the authority of the captain from the plaintiff to come to this port. We have already stated the reasons, which have brought us to the conclusion that he was; and in this view of the case, the judgment of the parish court must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be reversed, that there be judgment for defendants, and that the plaintiff pay costs in both courts.

GAROIA vs. *SILVA & AL.*

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

APPEAL from the court of the parish and city of New-Orleans.

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

PORTER, J. delivered the opinion of the court. This case presents the same questions as that just decided between the defendants and Patron.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for defendants with costs in both courts.

MONTEGUDO vs. SILVA & AL.

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This case presenting the same points with that of Patron against the defendants:

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure

It is ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for defendants with costs in both courts.

CASTANEDO vs. SILVA & AL.

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This case presenting the same points with that of Patron against the defendants:

A shipper cannot demand the delivery of his goods, if the landing of them would expose the vessel to seizure.

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CASTANEDO vs. SILVA & AL.

It is ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendants with costs in both courts.

KENNER & AL. vs. THEIR CREDITORS.

If on a comparison of the day of acceptance, the day designated for payment, and the tenor of the bill, it appears that the days of grace were included with those of sight, between the day of acceptance and that designated for payment, that day is the peremptory one of payment, and protest on it is legal.

If the acceptance on it be not dated, parol evidence is admissible, to shew on what day it was made.

APPEAL from the court of the parish and city of New-Orleans.

[For the facts in this case, the reader is referred to 8th Martin's Reports, n. s. page 36.]

If, on a comparison of the day of acceptance, the day designated for payment, and the tenor of the bill, it appears that the days of grace were included with those of sight, between the day of acceptance and that

PORTER, J. delivered the opinion of the court. The appellants were placed in the tableau of distribution, as holders of bills of the insolvents, to which the same objection was made as to those held by the Bank of the United States, who were also creditors in this *concurso*. See *vol.* 8, *Martin, n. s. page* 36.

In that case, we overruled the objection, and we see no reason to change our opinion.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, that the appellants be replaced on the tableau, and the appellees pay the costs of this appeal.

designated for payment, that day is the peremptory one of payment, and protest on it is legal.

If the acceptance on it be not dated, parol evidence is admissible to show on what day it was made.

MOORHEAD vs. THOMPSON & AL.

The capacity of persons sueing as heirs, need not be proved, unless it be specially denied.

Where an account is called for, the general rule is, the statement furnished cannot be divided.

Parol confessions of a party, made orally, should be received with great caution.

APPEAL from the court of probates for the parish of Iberville.

The plaintiff, as attorney in fact of the heirs of Nathaniel Scales, jr. brought this suit to recover from Joseph Thompson, curator of the estate of Robert Thompson, deceased, who was curator of the succession of Scales, the sum of thirteen thousand seven dollars and three cents. Erwin, the surety in the curator's bond, was made a party to the suit, and judg-

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ment prayed against him as such. The defendants plead payment, and filed with their answer certain accounts and vouchers against the succession of Scales, in support of their plea. The court below gave judgment against the defendants jointly, for six thousand five hundred and seventy-five dollars and forty-seven cents, from which Thompson appealed.

Pierce, for appellant.

1. The court had no jurisdiction over the claim against Erwin.

2. The judgment is against Thompson, personally, when he is sued as curator.

3. The power of attorney is not duly proved.

Workman, for appellees.

PORTER, J. delivered the opinion of the court. This action is brought against the curator of the succession of the curator of N. Scales, junior's estate, to compel a liquidation of the accounts of the succession and payment of the balance due. The surety in the curator's bond is made a party to the suit, and judgment is prayed against him as such.

The general issue, and payment, were pleaded.

After an examination of the vouchers produced by the defendant in support of his plea of payment, and the other evidence, oral and documentary, the court gave judgment jointly against Thompson and Erwin, for six thousand five hundred and seventy-five dollars and forty-seven cents, with interest from judicial demand.

The correctness of this judgment against Erwin cannot be examined, as he has not appealed from it, and is not before the court.

An objection has been made here, which the pleadings in the court below do not present. It is contended, there is no legal proof of the persons for whom suit is brought being heirs, nor any that the plaintiff is the representative of these heirs.

The capacity of persons suing as heirs need not be proved unless, it be specially denied.

This objection should have been taken in *limine litis;* it has been repeatedly decided by this court, that a denial of all the facts and allegations in a petition, amounted to the general issue, and did not require proof of the representative character of the plaintiff, where suit was brought in that character; that it formed the *contestatio litis*, on the merits alone. We decided a few days since, that such a plea did not put at issue, the *amicable*

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demand, which was one of the allegations of the petition.

There are two questions of law presented by the proceedings, which it is proper to dispose of, before the merits are gone into.

The first relates to documents offered by the defendant in evidence. A bill of exceptions states, they were rejected. They consist of a letter from the intestate to the house of Kenner & Co.; a draft on them for two thousand dollars; and a letter from that house to Thompson, the curator. There is also their account current with deceased. We think the judge should have admitted them, and we are clear the cause should not be remanded because he did not. For, far from establishing any payment by the curator, they prove the reverse, namely, that the account was discharged through other sources.

The second grows out of a position assumed by the defendant, in support of his account. He contends, that if the plaintiff relies on it to establish the sums received by defendant, he must admit all the items which it offers in discharge; that it cannot be divided. The plaintiff insists, the principle invoked does not apply to persons who are

Where an account is called for, the general rule is, the statement furnished cannot be divided.

bound by law to furnish accounts, agents, &c. And of that opinion is this court. We have already expressed ourselves to the same effect, in the case of *Smith* vs. *Hanrathy*. Where the account is called for, the general rule is, the statement furnished cannot be divided. But where it is the duty of the party producing it to render one, no such consequence follows. The distinction appears to us, to rest on solid grounds. Where the evidence is, or was, equally within the power of both parties, and one of them, instead of procuring it, and furnishing it, chooses to rely on his adversary's confessions, it is proper he should take them together. He voluntarily makes him a witness. But where business is intrusted to the gestion of an agent, the principal has no means in the greater number of instances, of ascertaining, how it is conducted, except through the account which that agent furnishes. If the latter, in rendering this account, had nothing more to do, but by charging himself with the sums received, to obtain credit for every thing he placed on the other side in discharge, it is evident the legal obligation to render an account, would be of no use to the party for whose benefit the law imposes this obligation.—*5 Martin, n. s.* 320.

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MOORHEAD vs. THOMPSON & AL.

Proof of confession of a party made orally should be received with grat caution.

On the merits, the principal matter contested between the parties, is the credit due to the witness, who testified in relation to a large portion of the items in the curator's account. He swears that the father and heir of the deceased, admitted them in his presence to be correct. Proof of confessions of this kind, as we have more than once remarked, is extremely dangerous, and should be received with great caution. But the high respectability of the witness on this occasion, who is no other than the judge of probates of the parish where the succession was opened, forbids the belief that he has stated more or less than the truth. Indeed, it is not pretended he has done so intentionally, but it is said he may be mistaken, and probably is so, because the date of the account is posterior to the time at which the acknowledgment was made. The judge states, that the father acknowledged certain items contained in the account now presented, but it does not follow, those items may not have been presented in another account previous to the drawing off of that which was filed with the answer. The difference in time is easily accounted for, by supposing, a not unfrequent occurrence, of

parties making some steps towards a settlement, before the regular submission of the accounts to the court of probates.

The acknowledgment of the father, in his own right, and as attorney for the mother of the deceased, from whom he had authority to compound and settle the debt, binds the parties to this action, unless they show it was made in error.

On an examination of the accounts, we are unable to say the court of probates erred, in the balance it considered due to the plaintiff; but there is error in giving judgment personally against the defendant. He is curator, of the succession of the curator of Scales' estate, and it is not seen how he is personably liable. The 1007*th article* of the *Code of Practice* authorises judgment, against the curator in his personal capacity, who fails to pay over the balance due to the heir. But that responsibility does not descend upon the representative of the curator. The debt, as it relates to him, is in the same situation with every other, against the estate he administers.

The personal responsibility of a curator does not devolve on his curator.

The curator to Scales' estate was appointed under the old Civil Code, which gave a mortgage on his estate from the day of his appointment. *C. C.* 176, *art.* 135.

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It is therefore ordered, adjudged and decreed, that the judgment of the court of probates, so far as it relates to the defendant, Joseph Thompson, be annulled, avoided and reversed; and it is further adjudged and decreed, that the plaintiff do recover from the said Joseph Thompson, curator of the estate of Robert Thompson, the sum of six thousand five hundred and seventy-five dollars and forty-seven cents, with interest thereon at five per cent. from judicial demand, the same to be paid by the defendant curator as aforesaid, in due course of administration as a mortgaged debt; and it is further decreed and ordered, that the appellees pay the costs of this appeal, and the defendant and appellant those of the first instance.

LEGGETT vs. PEET & AL.

The defendant causing a copy of the judgment to be served on the plaintiff, is not such an execution of it, as deprives the former of his appeal.

The plaintiff must make out his title to the instrument sued on, and if the contract by which he acquired it was null and void, it can produce no effect whatever.

Where no objection is made below, to the admissibility of the evidence, the supreme court considers its effect only.

APPEAL from the court of the first district.

This was an attachment sued out by the plaintiff, as endorsee, against the defendants as drawers of a bill of exchange. An attorney was appointed to defend the suit, who pleaded, *first*, that no property had been attached, and that the court was without jurisdiction; *second*, the general issue; *third*, that the plaintiff took the bill after he knew it was dishonored, and with the knowledge that it was given without consideration.

The facts are substantially these.

Wm. A. Peet, James A. Peet and Munson S. Peet, composed a commercial partnership, doing business in New-Orleans, under the firm of Wm. A. Peet & Co. and in New-York, under the firm of J. & M. Peet & Co. On the 30th March, 1826, Wm. A. Peet & Co. made and delivered to R. & B. McDevitt, a bill of exchange on J. & M. Peet of New-York, ordering the said J. & M. Peet, sixty days after sight, to pay to the said R. & B. McDevitt, $6,000 for value received. J. & M. Peet refused to accept the bill—no protest was made, and it remained in the hands of R. & B. McDevitt until July, 1827. Previous to that time, R. and B. McDevitt had applied in New-York for the benefit of the insolvent laws, and being opposed

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LEGOTT vs. PEET & AL.

by the plaintiff, and other of their creditors on the ground of fraud, were detained in prison. While there, they agreed, that if the plaintiff would withdraw his opposition, they would transfer to him the bill of exchange on J. & M. Peet, which they still held. The plaintiff accordingly withdrew his opposition. R. and B. McDevitt were discharged, and on the 19th of July, 1827, the bill was transferred to the plaintiff. It further appeared, that the bill of exchange was given to R. and B. McDevitt in payment for goods, bought of them by Wm. A. Peet and Co. and that one Prall had brought suit to set aside the sale of the goods from the McDevitts to Wm. A. Peet and Co., on the ground of collusion and fraud.

This suit of Prall, was pending at the trial of this cause, and the uncertainty of its termination, was urged as an objection to the plaintiff's recovery in the present action. The cause was tried by a jury, who returned the following verdict. "We the jury, find for the plaintiff a vercict of thirty-one hundred dollars, and interest from the judicial demand; but we find that Wm. T. Prall commenced suit against Wm. A. Peet and others, No. 7662 of this court, the 10th of July, 1827, if said suit in law,

prevents the recovery of the plaintiff we find for the defendant." On this verdict, the court decreed as follows. It is ordered that judgment be entered in favour of the plaintiff, upon the verdict of the jury, for the sum of $3,100, with costs; subject to this condition, viz: that if the suits referred to in the verdict of the jury, viz: the suits of Prall vs. Willaim A. Peet and others, and Muller vs. Wm. A. Peet and others now pending, shall be determined against said Peet, then this judgment is to be considered as null, and of no effect, and the plaintiff Leggett, in that case, instead of Peet, is to pay the costs of this suit. The plaintiff Leggett, is not to have the benefit of this judgment, before the final decision of the suits aforesaid; this judgment is considered as within the equity of article 2535 of the Civil Code."

From this judgment the defendants appealed.

Hennen, for appellants.

1. The demand of plaintiff is illegal, and without consideration.

2. The Judge erred in his charge to the jury.

3. The evidence shows that judgment should be rendered for defendants.

Preston, contra.

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1. The judgment is made conditional, and dependant upon the suit of Prall vs. Peet and others; and Muller vs. Peet and others In the latter suits, the Peets may confess judgment or compromise, and make a collusive defence. The condition is therefore protestative as to the Peets, and null. C. C. 2029.

2. The jury submitted to the court a mere question of law; whether the suits in their actual state barred plaintiff's recovery or not; this should have been unconditionally decided.

3. The Peets cannot oppose to Leggett as assignee of the McDevitts, the danger of eviction, by Prall and Muller, because they knew that danger at the time of giving the bill of exchange. C. C. art. 2535.

4. The Peets cannot avoid the contract between them and the McDevitts, however fraudulent. C. C. art. 1969.

5. The actions brought by Prall and Muller, on which the judgment is dependant, are prescribed. C. C. art. 1982.

PORTER, J. delivered the opinion of the court. This action is brought against the defendants as drawers of a bill of exchange on J. & M. Peet of New-York. The draft

was payable to R. & B. McDevitt, who endorsed it to the plaintiff. The petition states, that the firms of Peet & Co. in New-Orleans, and J. & M. Peet of New-Yew, were composed of the same persons, viz; of William A. Peet, James A. Peet and Munson S. Peet; and this suit is brought against them all. They are alleged to be absent debtors, and an attatchment was prayed for, and granted against their property.

The bill of exchange was dated the 30th of March 1826; and payable sixty days after sight; acceptance was refused by the drawees, J. & M. Peet. There is no allegation of protest, and notice; but the petition avers, that by reason of the non-acceptance, the plaintiffs have become liable to pay the amount of the draft.

The attorney, appointed by the court to defend the suit, pleaded, *first*, that no property had been attached, and the court was without jurisdiction; *second*, the general issue; and *third*, that the plaintiff took the bill after he knew it had been dishonored, and with the knowledge that it was given without consideration.

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From the evidence adduced in the cause, it appears that a suit was commenced, and at the time the trial was pending in which one William T. Prall was plaintiff, and Peet & Co. defendants. In that suit the plaintiff charges the sale made to the defendants by the payee of the note, now sued, to be false, fraudulent and collusive, and he prays for a rescission of it. The pendency of the demand, and the uncertainty of its termination, was offered as an objection against the plaintiff's recovery in the present action; the bill of exchange, on which it is instituted, being given in payment of the property which Prall was endeavoring to recover.

The verdict was in the following words: "We the jury, find for the plaintiff a verdict of thirty-one hundred dollars, with interest from judicial demand; but we find that William T. Prall commenced suit against Wm. A. Peet and others, in this court, the 10th of July, 1827. If said suits in law prevent the recovery by the plaintiff, we find for the defendant."

On this verdict, the court below ordered as follows. "It is ordered that judgment be entered in favour of the plaintiff upon the

verdict of the jury for thirty-one hundred dollars with costs, subject to this condition, viz: that if the suits referred to in the verdict of the jury, viz: the suits of *Prall vs. William A. Peet & al.* and *Muller vs. Peet & al.* now pending, shall be determined against said Peet, then this judgment is to be considered as null and of no effect, and the plaintiff, Leggett, in that case, instead of Peet, is to pay the costs of the suit. The plaintiff Leggett, is not to have the benefit of this judgment before the final decision of the suits aforesaid. This judgment is considered within the equity of article 2535 *of the Civil Code.*"

From this judgment the defendants have taken the present appeal. The plaintiff has moved to dismiss it on the ground that the defendants by their acquiescence in the judgment below, have deprived themselves of the right of appealing; but should this motion fail, he insists there is no error in the decree of the district court, except to his prejudice. The specification of this error is, that the Judge has made the recovery of the plaintiff conditional, on the event of the suit pending between *Prall & Peet & Co.* when it should be absolute.

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LEGENDRE
vs.
PUEY & AL.

The acquiescence in the judgment, by which the defendants have lost the right to appeal, is supposed to result from their having taken out of the clerk's office, and procured to be served on the attorney of the plaintiff, a copy of the judgment rendered in the inferior court.

The 567th article of the Code of Practice provides, that the party against whom judgment has been rendered, cannot appeal "if such judgment has been confessed by him, or if he has acquiesced in the same by executing it voluntarily."

The defendant causing a copy of the judgment to be served on the plaintiff, is not such an execution of it, as deprives the former of his appeal

We do not think the act of the defendants in serving a copy of the judgment on the plaintiff, such an execution of it, as deprives them of the right of appeal. The act should be unequivocal, to authorize a presumption of the abandonment of so important a right. And it is not a voluntary execution of the judgment in this case, because no such obligation was imposed on the defendants. It is different from the case of the party, in whose favour judgment is given, proceeding to execute it. The plaintiff who takes the necessary measures for issuing execution, would perhaps be considered as coming within the

article of the Code of Practice, because he can perform no other act of voluntary execution.

It is proved that the plaintiff in this case took the bill from the payees for a debt they owed to him; but it is also proved that at the time the trasfer was made, they were in prison in New-York, and had applied for the benefit of the insolvent laws of that state. The plaintiff had made opposition to their demand, and charged them with fraud, upon which they proposed to assign to him the note now sued on, if he would withdraw his opposition. He did so; the note was transferred, and the endorsers were discharged.

It is objected that this transaction was null and void by the laws of New-York, and that no right could be acquired under it. The plaintiff insists that it is a matter entirely between him and the endorsers; that the maker of the note has nothing to do with it. Of this opinion was the Judge of the court of the first instance, and so charged the jury. The defendants excepted.

If the act of withdrawing the accusation of fraud, in consequence of receiving the note now sued on, was a relative nullity, the Judge

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The plaintiff must make out his title to the instrument sued on and if the contract by which he acquired it was null and void it can produce no effect whatever.

below did not err; but if it was an absolute nullity, he did err. Because the plaintiff must make out his title to the instrument sued on, and if the contract by which he acquired it was null and void, it can produce no effect whatever.

From an examination of the adjudged cases in the State of New-York, where the transaction took place, it appears, that the courts of that state, consider all agreements, such as that proved in this instance, void *ab initio*. In the case of *Wiggins vs. Bush*, the note had passed into the hands of a third person; but the defence was sustained, and the case did not require a positive opinion whether the obligation was void or voidable. The reasoning of the court on the subject matter, and in reference to previous decisions, leaves no doubt in our minds of the legal character of the transaction there. Were we, however, to admit, that the laws or jurisprudenc of New-York have not been sufficiently shown to enable us to pronounce positively on the question, the case of the plaintiff would not be strengthened. We should then be obliged to have recourse to our own laws, and in this state there can be no doubt such a contract

is void. The 1887th article of our Code declares, that an obligation with an unlawful cause, can have no effect. The 1889th article says, the cause is illicit when it is forbidden by law, or *contra bonos mores*. We have already expressed our opinion of agreements, such as this, in the case of *Perry vs. Frilot*. In England and our sister states, the protection afforded by the law merchant to the innocent endorsees of negotiable paper, does not extend to instruments which are null and void. But this case is free from any consideration of this kind. The note was endorsed long after it came due. The obligation of the holder to prove that the rights of the transfer are vested in him, is totally independant of the commercial law. Uuntil he does so, he establishes no right in himself, and he cannot do so by *a void contract*; because such a contract produces *no effect*. 2, *John. Reports*, 386, 4 *Ibid* 410, 9 *Ibid* 295, 12 *Ib.* 306. *La. Code* 1887, 1889, 6 *Mart. n. s.* 217, 3 *Ib.* 205.

In the state of New-York, there are two statutes in regard to persons unable or unwilling to pay their debts; one is entitled "an act for the relief of debtors, with respect

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LEGGETT vs. PAUL & ALL.

to the imprisonment of their persons;" the other, "an act for giving relief in cases of insolvency." The counsel for the plaintiff has referred us to several sections of the former law, and argued from them, that as the cession made by the debtor in confinement, was only for the benefit of the creditors who had charged him in execution, there was nothing immoral nor contrary to the policy of the law, in any creditor entering into terms with the person whom he had caused to be imprisoned. It is not necessary for us to say, whether the construction which the counsel has given to the statute be or be not correct. For the evidence shows that the endorsers of the note had applied for the benefit *of the act for insolvents*. And in looking into it, we find it contains the provisions which are common to laws of this description, and that any stipulation of a creditor to withdraw a charge of fraud against the debtor, would be a violation of its policy, fraudulent, and void. The ninth section of this act, provides for the case of persons in custody, and points out the manner a cession of their estate shall be made. *Laws of New-York, vol.* 1, 348, 460.

Objections have been made to the enquiry into the consideration of the endorsement,

because it was not specially pleaded; and it was also urged, that the record should have been produced of the application of the endorsers, for the benefit of the insolvent law. The contract under which the plaintiff claims may perhaps be shown to be void, under the general issue, and the corrupt agreement in this case being matter *en pais*, it is questionable whether it was necessary to produce the record to which it referred. The deposition of a witness, who proved the facts, was taken some time before the trial, and subject to all legal exceptions. But when the case was before the jury, no objection was made to the testimony by which the same matters were established. The case therefore must be decided on the legal effect of the evidence given.

Where no objection is made below to the admissibility of the evidence, the supreme court considers its effect only.

We think the contract, under which the plaintiff claims to stand in the right of the payees of the note, void, and that he cannot maintain an action on it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for defendants with costs in both courts.

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SAUL
vs.
HIS CREDITORS

SAUL vs. HIS CREDITORS.

The sale of stock, by the syndics of an insolvent who was bound to return it, changes the nature of his obligation into one for the payment of money, puts the parties in the precise situation of creditor and debtor, and gives rise to compensation.

APPEAL from the court of the first district.

The Bank of Orleans, filed their opposition to the tableau of the insolvent, and contended that from the sum of seven thousand six hundred and seventy-two dollars and twenty-five cents, allowed to the estate of Morgan, there ought to be deducted six thousand eight hundred dollars, being the amount which was to be paid to Astor, of New-York, by the syndics of Saul, on an accommodation note of Morgan's endorsed by Saul, and for which no consideration had been received.

It appeared, that the amount for which the syndics of Morgan had been placed on the tableau, was produced from the sale of stock belonging to Morgan, which remained in the possession of Saul at the time of his failure, and was sold by his syndics as part of his estate. The only question in the case was, whether the syndics of Saul had a right to retain the pro-

ceeds of the stock, on account of the payment and liability to Astor.

The court below sustained the opposition, and the syndics of Morgan appealed.

Eustis, for appellant.

Pierce and *Slidell*, for appellee.

MATHEWS, J. delivered the opinion of the court. The present opposition to the claim of Morgan's syndics, involves a question of compensation or set-off. By a decision of this court, found in 7 *Mart. Rep. n. s. p.* 601, it was settled, that the syndics of Morgan's estate had a right to recover from the estate of Saul, a certain amount of stock of the Bank of Orleans, which was intended to have been given by Saul to Morgan in exchange for a similar amount transferred from the latter to the former, but not having been delivered to Morgan, remained as a part of Saul's estate at the time of his failure, and as such, was sold by his syndics. It is not contended that this sale was illegal, but that the price for which it was sold is due to Morgan's estate. It seems, from the opposition now filed on the part of the Bank of Orleans, that a sum of seven thousand six hundred and seventy-two dollars and twenty-five cents was allowed to

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SAUL vs. HIS CREDITORS

the estate of B. Morgan, from which the intervening party claims a deduction to the amount of six thousand eight hundred dollars, being a sum paid or to be paid by Saul's syndics, on account of his endorsement on an accommodation note of Morgan's, held by John J. Astor, &c. By the sale of the stock, the estate of Saul became debtor to that of Morgan for its price; and by the payment of Morgan's debt, his estate is debtor to Saul's, *pro tanto*. This appears to us to make a case in which compensation legally takes place. The sale of the stock by the syndics of Saul's estate, changed the nature of the obligation to return the thing into one for the payment of money, and puts the parties in the precise situation of creditor and debtor.

The sale of stock by the syndics of an insolvent who was bound to return it, changes the nature of his obligation into one for the payment of money, puts the parties in the precise situation of creditor and debtor, and gives rise to compensation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

SHIFF vs. INSURANCE COMPANY.

The insurers are liable for all the labour and expense attendant upon an accident which forces the vessel back into port, but not for a claim for commission on the whole amount of the cargo.

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SHIPP vs. MIS. INS. COMP.

APPEAL from the parish court for the parish and city of New-Orleans.

The brig Mechanic, insured by the defendants on a voyage from New-Orleans to Philadelphia, sustained an injury in descending the river Mississippi, and was towed back to the city to be repaired. A general average was made up in which a commission of two and a half per cent. was charged on the amount of the cargo shipped by the plaintiff, and to recover which, (the defendants having refused payment) the present action was brought.

Lewis, a witness for the plaintiff, deposed that he had been a merchant for thirty years, and during that time had made up between three and four hundred general averages. That it was his constant custom to charge two and a half per cent. on the whole amount of the cargo, in cases similar to the present. That he had known that charge paid in many instances by an insurance company in New-Orleans, of which he had been the secretary, and that the same charge had been allowed and paid in London and in New-York. Several other witnesses testified that the charge was a customary one, and had been allowed and paid by different Insurance offices in the United States. The defendants

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introduced one witness only, who stated that he had been a merchant for twenty-five years, and had never known a charge like the present made in the United States, and further, that he was acquainted with the custom in Great Britain, and that payment of such a charge had been invariably refused by the offices in London and Liverpool. There was judgment for the defendants and the plaintiff appealed.

Pierce, for appellant.

The judgment of the court below is against the evidence and the law.

Morse, for appellee.

MATHEWS J. delivered the opinion of the court. This suit is brought in consequence of the Insurance Company having refused to pay to the plaintiff an item in an account of general average, by which they were charged a commission of two and a half per cent. on the cargo of the brig Mechanic, insured from New-Orleans to Philadelphia. The judgment of the court below is in favour of the defendants, from which the plaintiff appealed.

It appears from the evidence of the case that the vessel and cargo were both insured.

She suffered an injury in descending the river Mississippi, and it became necessary to tow her back to the port again to be repaired. All the charges for expenses actually incurred and services performed in towing the brig from the place where the accident happened to New-Orleans; landing and restowing cargo; in storing it when taken from the vessel &c. were admitted by the defendants as correct, and payment was offered, with the exception of the commission charged on the whole value of the cargo.

The plaintiff insists that he has a right to claim and recover this commission, according to a general custom of merchants in relation to goods placed in a situation similar to that, in which the cargo of the Mechanic was found after her return &c.

No adjudged case, or commentary on the law merchant, has been adduced, showing the existence of such a custom; but an attempt is made in the present case to prove its existence by the testimony of factors and brokers, and officers or agents of Insurance Companies, and other persons in several states of the Union. This testimony is contradictory, and does not establish a general average or cus-

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tom in relation to the plaintiff's claim. His right to recover, must therfore, depend on a contract either express or implied on account of services rendered, or risque and responsibility. But it is not supported in either of these ways. Over and above the commission claimed, full wages seemed to have been charged for unloading and re-loading the vessel; also, expenses for storage, cooperage and every item of expense that can possibly be imagined. On account of services, then the commisson cannot be justly allowed. And it is equally inadmissible on the score of risque or responsibility, for the vessel and cargo remained at the risque of the insurers from the time she was first laden, until the completion of the voyage, insured according to the terms of the policy. They were the persons principally concerned in the safety of the brig and cargo, whose interest was to be secured by all the labour and expense which became necessary after the occurrence of the accident, which forced the vessel again into port; and for these they are justly responsible, but not for the claim of a commission on the whole amount of cargo. This claim has no just or reasonable grounds of support.

The insurers are liable for all the labor and expense attendant upon an accident which forces the vessel back into port, but not for a claim for commission on the whole amount of the cargo.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

BACK vs. MEEKS.

With the knowledge of redhibitory vices in a slave, the attempt to impose him on another as free from them is fraudulent.

A defendant is liable under his warranty, whether the redhibitory defects be known to him or not.

Appeal from the parish court for the parish and city of New-Orleans.

This was a redhibitory action to rescind the sale of a slave.

It appeared from the testimony that the slave was sold to the defendant without warranty against any vice, malady or defect, and that the defendant afterwards sold him to the plaintiff, warranted free from the vices prescribed by law. It further appeared, that the slave was in the habit of running away, both prior and subsequent to the sale to the plaintiff. There was judgment for the plaintiff, and the defendant appealed.

Eustis, for appellant.—*Canon*, for appellee.

Mathews, J. delivered the opinion of the court. This is a redhibitory action in which

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the plaintiff claims the recission of a sale made to him by the defendant of a certain slave named Andrew, and restitution of the price on account of the vice of running away, as alleged in the petition. The judgment of the court below, is in favour of the former, from which the latter appealed.

The only question in the case is one of fact, i. e. whether the testimony establishes the existence of the vice as alleged?

This slave was sold as a runaway and a thief, to the person who sold him to the defendant. And in the sale to the latter, his vendor refused to warrant against any vices, maladies or defects whatever.

Notwithstanding these circumstances, which may be presumed to have been known by the defendant, he sold the slave in question to the plaintiff with full warranty. With this knowledge of his vices, the attempt to impose him on another as free from them, was fraudulent.

With the knowledge of redhibitory vices in a slave the attempt to impose him on another as free from them, is fraudulent.

The testimony of the keeper of the police jail, shows this slave was frequently confined as a runaway, whilst in the possession of two distinct proprietors, who owned him previous to the defendant, and that he was confined since by the plaintiff, amongst the slaves who

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work in chains. The whole evidence of the cause taken together, leaves no doubt on our minds of the existence of the redhibitory vice, as alleged in the petition, and of its being known by the vendor at the time of sale. But whether thus known or not, the plaintiff must succeed in his action, as the defendant is answerable under his warranty.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

HITCHCOCK vs. HARRIS.

Evidence of the receipt of a sum of money for a slave, and a promise to warrant the title, is sufficient evidence of a sale, and a document which contains evidence of these two facts, is a bill of sale, and admissible evidence.

Whether parol evidence can be received of a promise to warrant the soundness of a slave? Quere?

APPEAL from the court of the first district.

This suit was brought to recover back the price of two slaves, purchased with twelve others, by the plaintiff from the defendant, and which the petition alleged were unsound at the time of the sale, to the knowledge of the defendant. The general issue was pleaded, and on

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the trial of the cause the plaintiff offered in evidence, as a sale of the slaves, a receipt of the defendant for the price, and containing a promise to warrant and defend the title, and offered a witness to prove the hand writing of the defendant. To the introduction of this instrument the counsel for the defendant objected, on the ground that it had not the form or requisites of a sale, and that parol evidence of the defendant's hand writing could not be received. The objection was overruled, and the witness, on being sworn, testified, that he presented the receipt to the defendant, who acknowledged his signature, and said that he had warranted the negroes therein mentioned to be sound, and they were so.

There was judgment for the plaintiff and the defendant appealed.

Grymes and *McCaleb*, for appellant, contended:

1. The bill of exceptions was well taken, at least in part, the judge most assuredly erred in permitting parol evidence to prove that defendant confessed he had warranted the slaves to be sound, when the written instrument shows that he warranted the title only. 3 Starkie,

1007, note I; 1 Carolina Law Repository 263; 1 Murphy, 426.

2. Even admitting that parol evidence could be received, yet the court erred in not taking the whole admission together and undivided. The witness deposed, viz: "Defendant said he warranted the negroes in said document to be sound, *and they were so.* The admission that proved the warranty as to *soundness*, proved the *soundness* itself.

Eustis, for appellee.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to recover the price of two slaves, sold to him by the defendant, and damages, on an allegation, that at the time of the sale, they were, in the knowledge of the defendant, absolutely unsound, and of no value, laboring under a pulmonary disease, from which they since died. The general issue was pleaded. The plaintiff had judgment and the defendant appealed.

His counsel has called our attention to a bill of exceptions taken to the opinion of the court, who admitted in evidence an instrument of writing, offered as a bill of sale, and

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received parol proof of the defendant's hand writing.

The document objected to, was a mere receipt of the price of the slaves, concluding with a promise to warrant and defend the title.

Evidence of the receipt of a sum of money for a slave, and a promise to warrant the title, is sufficient evidence of a sale, and a document which contains evidence of these two facts, is a bill of sale, and admissible evidence.

It is very clear that evidence of the receipt of a sum of money for a slave, and the promise to warrant the title to him, is a sufficient evidence of a sale, and that the document which contains evidence of these two facts, is a bill of sale, and in the present case the court did not err in receiving the paper in evidence, nor in admitting testimonial proof of the signature of the vendor. 3 *Martin, n. s.* 330.

On the merits, the evidence was partly oral and partly written, and, as is often the case, somewhat contradictory, and we are unable to say the inferior judge erred in the conclusion to which he arrived.

Whether parol evidence can be received of a promise to warrant the soundness of a slave? Quere?

The appellant's counsel has, however, complained that parol evidence was received of a promise to warrant the soundness of the slaves: this evidence however was received without any objection on his part.

A charge of forty dollars for medical attendance is also said to be improperly al-

lowed, and it is said the doctor deposed he made no charge for these services. The testimony shows, the doctor said he made no particular charge for these two slaves, having attended them with others of the plaintiff—but he added, had he made a particular charge, he would have asked forty dollars for them. We conclude the judge did not err in taking it for granted that the plaintiff was charged for these negroes on the general bill he paid for his negroes, including these.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

WILLIAMS vs. BETHANY.

The plea of *res judicata*, like that of prescription, may be plead at any stage of the cause.

In a suit for holding over after the expiration of a lease, an offer of possession must be specially pleaded.

The deposition of a witness taken on a former trial for a previous year's rent, is proper evidence on a trial between the same parties for the rent of a subsequent year.

This was an action for rent, and damages done to the premises leased. After the jury

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had been sworn, the defendant plead *res judicata* to that part of the petition which claimed damages. To the admission of this plea, the plaintiff objected, on the ground, that being in the nature of payment for damages, it was presented too late.

The plaintiff having made an ineffectual attempt to procure the attendance of two witnesses, Vaughn and Cooney, offered to read their depositions taken down by the clerk upon the same contract now sued upon, and contained in the record of the suit, which the defendant introduced as *res judicata*. The defendant objected to their depositions being read, on the ground that they had not been taken in the present action. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Watts, for appellant.

1. The plea of *res judicata* came too late; it changed the issue and the cause was on trial.

2. The evidence of Vaughn and Cooney was improperly rejected.

3. The evidence of offer of possession was improperly admitted.

Andrews, contra.

Res Judicata is a peremptory exception, founded in law, and can be plead at any stage of the cause. C. P. 345, 346.

MARTIN, J. delivered the opinion of the court. This is an action on a written lease for rent and dilapidation. The defendant craved oyer and time to plead. After oyer, but before an answer was filed, a jury was impanneled, and the plea of *res judicata* to the dilapidation was filed. The defendants had a verdict and judgment, and the plaintiff appealed.

His counsel has urged that the plea ought not to have been received: improper evidence was received and properly rejected. The judge gave an erroneous charge, and judgment ought to have been given for the rent.

It has been urged that the plea came too late, as the cause was on trial, and the issue was thereby changed. *Code of Practice*, 419, 420.

The appellee's counsel has urged that the plea of *res judicata* is a peremptory exception, founded on law, and is pleadable at any time. *Ib.* 345, 346.

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The articles of the Code relied on by the appellant's counsel, provides that the petition and answer may be amended after issue joined on leave; provided the plaintiff's amendments does not alter the substance of the demand, and the defendant's amendment is subjected to the same rule; and he may add new exceptions, not of the dilatory kind.

The articles filed by the appellee's counsel, provide, that peremptory exceptions, founded on matter of law, may be pleaded in every stage of the action previous to the definitive judgment; and such exceptions are said to be these, which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, because it is either prescribed, or destroyed, or extinguished.

The plea of *res judicata*, like that of prescription, may be plead at any stage of the cause.

The exception of *res judicata*, like that of prescription, is one which does not go into the merits of the cause, but shows that the plaintiff cannot maintain his action, because it is destroyed or extinguished by a judgment. Such an exception is timely at any stage of the action before definitive judgment, and may therefore be pleaded after the trial has begun. It is no objection to it,

that it changes the nature of the defence, because such an objection lies only to exceptions on matters of fact, not to those on matters of law.

In a suit for holding over after the expiration of a lease, an offer of possession must be specially pleaded

II. Evidence was given of an offer of surrendering possession, and the appellant complains that this was improperly permitted, as perfectly foreign to the issue, which was *res judicata vel non*.

The appellee's counsel has replied, the evidence was proper, as the plaintiff claimed damages for the defendant's holding even after the expiration of the lease.

As the defendant did not plead such an offer, without the plaintiff was prepared to contradict it, the evidence was improperly admitted.

III. Vaughn being out of the state, and process of attachment against Cooney having been issued (on his failing to attend on a subpœna) without success, this testimony taken down in the suit between the same parties, (in which the judgment relied on in the plea of *res judicata* was given,) was rejected.

The appellant's counsel has referred us to the testimony of these witnesses, which comes up with the record, and contended it was

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The deposition of a witness taken on a former trial for a previous year's rent, is proper evidence on a trial between the same parties for the rent of a subsequent year.

properly rejected, as they relate to the plaintiff's demand for the first year's rent of the premises.

In a suit for holding over at the expiration of the lease, rent and dilapidation, many facts are proper evidence, which were proven on the claim of the first year's rent. The testimony was given in the presence of both parties, each had the opportunity of cross examination. We think the testimony ought to have been admitted. This case does not differ from that of *Hennen* vs. *Monroe*, which was for contribution, on a general average, for books of the plaintiff's in the defendant's vessel; in which testimony in a former suit between the same parties for injury to the plaintiff's books, through the defendant's neglect was admitted.

IV. We have not examined the judge's charge; the appellee's counsel having shown that it was made contrary to the wishes of his client, who alone excepted to it.

V. As the conclusion we have come to, on the third point renders it necessary to remand the case, we have not examined whether judgment ought to have been given for the second year's rent.

It is therefere ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside and the case remanded for a new trial, with directions to the judge to reject evidence of the offer of surrender of possession, and to admit the testimony of Vaughan and Cooney, the appellee paying costs in this court.

MILLER & AL. vs. BREEDLOVE.

Where the return of the commission shows that the interrogatories were all answered, the circumstance of their not being answered separately and by number, does not vitiate the return.

The supreme court will not notice objections which were not made in the court below.

APPEAL from the court of the parish and city of New-Orleans.

On the trial of this cause, the defendant offered the testimony of witnesses examined under a commission, to the introduction of which the plaintiff objected on the ground that the witnesses had not answered the interrogatories in succession, and one by one; and that said interrogatories had not been regularly put. The

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objection was sustained and the defendant excepted.

McCaleb, for appellant.

The judge below erred in rejecting the evidence taken under the commission: C. P. 431, 432, 436, 437, 438: acts of 1828, p. 152, sec. 7, 8, 9.

PORTER, J. delivered the opinion of the court. This action is brought to recover the freight of tobacco, received by the defendant as consignee. The defence set up is, that the property was damaged by the want of care of the master and officers of the steam-boat.

On the trial, the defendant offered depositions, in evidence taken under a commission; they were objected to on the ground that the witnesses had not answered the interrogatories one by one, and that said interrogatories had not been regularly put. The court sustained the objection and the defendant excepted.

Where the return of the commission shows that the interrogatories were all answered, the circumstance of their not being answered separately & by number, does not vitiate the return.

The return to the commission does not show, as is usual, an answer to each interrogatory separately, and by number, but it shows they were all answered, and in the order in which they were put. Such being the

fact, we do not think that the mere circumstance of the answers being written closely on the paper without breaks, or a statement that they were a reply to each interrogatory by its number, vitiates the return. The statement that all the interrogatories were put at once, appears to us gratuitous. We should rather conclude from each being answered distinctly and completely, that they were put separately, and that the manner in which they were spread on the paper was acoidental. It is stated in the bill of exceptions that other objections were made to the testimony, on matters appearing, by the process verbal of the return; but these objections are not specially set out, and we cannot notice any which, do not judicially appear to have been made below.

The supreme court will not notice objections which were not made in the court below.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this cause be remanded to the parish court, with directions to the court not to reject the testimony, because the answers are not separate to each interrogatory; and it is further ordered, that the appellee pay the costs of this appeal.

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VANCE & AL. vs. CLARK & AL.

VANCE & AL. vs. CLARK & AL.

If the owner voluntarily receive the goods at an intermediate port, such an acceptance constitutes the basis of the rule for a *pro rata* freight.

APPEAL from the court of the parish and city of New-Orleans.

The petition set forth, that the plaintiff entered into a contract of charter party, with the defendants for the ship Spartan, on a voyage from New-Orleans to off the south side of the river Rio Grande. That in pursuance thereof, he filled up the ship, and stipulated to pay a certain sum for the freight and primage, estimated at two thousand seven hundred dollars. That the ship proceeded on the voyage, and arrived at her place of destination, when, after landing a small part of the cargo, she was compelled by stress of weather to put back to New-Orleans. That a part of the cargo, consisting of flour and corn, which was brought back, was greatly damaged, and sold as unfit to be reshipped; and the remainder deposited by the defendants in the custom-house, until the Spartan could be put in readiness to proceed again on the voyage to Rio Grande.—That the defendants (instead of shipping the

goods by the [Spartan, after the completion of her repairs, and giving the plaintiff the option of filling her up with other goods, equivalent in bulk to the corn and flour which had been damaged and sold) were about to ship the goods to Rio Grande by another vessel. That the plaintiff had required of the defendants to place the Spartan at his disposal, according to the terms of the charter party, or to deliver up his merchandize, which had been refused. The petition concluded with a prayer for damages; that the goods might be sequestered, and the defendants enjoined from shipping or exercising any control over them.

The defendants answered, that in pursuance of the covenants stipulated in the charter party, they delivered at Rio Grande a part of the cargo, and were proceeding to deliver the whole, when, by the perils and dangers of the seas, the ship was greatly damaged, and compelled to put back to New-Orleans, to refit. That upon her arrival at the latter port, she was condemned by the port wardens, after a regular survey, abandoned to the underwriters and sold, in consequence of which they were unable to forward the remaining goods in the chartered ship, but that they procured another vessel,

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and were proceeding to ship the goods, when they were stopped by the plaintiff's injunction. That inasmuch as they had delivered a part of the cargo, and would have delivered the residue, but for the wrongful interference of the plaintiff, they were entitled to two thousand seven hundred dollars, the stipulated freight, for which sum they reconvened and prayed judgment.

To this plea in reconvention, the plaintiff answered, that the Spartan, at the time of sailing, was unseaworthy and incapable of performing the voyage; that she leaked badly, and damaged the cargo to the amount of two thousand seven hundred dollars, which sum they plead in compensation to the plaintiff's claim in reconvention.

It appeared from the testimony, that the ship leaked before leaving the Mississippi, so much so, as to require two spells at the pumps night and morning. Two days out from the Balize, she encountered a gale of wind, leaked badly during the whole voyage, and the cargo suffered considerable damage.

It was admitted, that upon the return of the Spartan, a survey was held on her, and she was ordered to the ship yard to discharge. That five hundred bags of corn, in the bottom, were

so much damaged as to require to be thrown overboard. That upon the application of the plaintiff, a further survey was held, when the remainder of the flour and corn was found to be more or less damaged, and ordered to be sold. It was sold, and produced the sum of nine hundred and eighty dollars. That the portion of the cargo not landed at Rio Grande, and not sold in New-Orleans, was, after the institution of this suit, shipped by the plaintiff to Rio Grande. That the ship was abandoned to the underwriters, sold, and purchased by Clark, one of the defendants. That after the sale to Clark, the ship was repaired, and put in as good a condition as she was when first chartered. It further appeared, that while under repair, Clark notified the plaintiff, that the ship would reload and proceed again on the voyage to Rio Grande, as soon as she could be put in readiness; to which letter, no answer appeared to have been returned by the plaintiff. The port wardens testified, that the cargo of the ship Spartan, which remained after the sale of the damaged part, would have been insufficient to ballast her, and that it would have been unsafe to have proceeded to sea with only that in her. It further appeared, that the defendants had pro-

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cured another vessel to proceed to Rio Grande with the remainder of the Spartan's cargo, and were shipping the same, when stopped by the injunction and sequestration, obtained at the instance of the plaintiff. The court below rendered judgment in favor of the plaintiff, relieving him from the payment of freight, from which the defendants appealed.

Livermore and *Strawbridge*, for appellants.

Watts, for appellees, contended:

1. The chartering owners forfeited all right to freight or charter money, by refusing to place the ship at the disposal of the plaintiff, after she was repaired.

2. Damages should have been given, for the violation of their contract.

MATHEWS, J. delivered the opinion of the court. The present contest arises on a contract of affreightment by charter party, wherein the defendants, Clark & Walden, agree to freight the whole of the ship Sparta, except the cabin, to the plaintiffs, for a voyage to a place near to the mouth of the Rio Grande, on the south side of said river. The vessel was fitted up by the freighters, who

stipulated to pay a certain sum for the whole freight and primage, estimated at two thousand seven hundred dollars. The ship sailed from New-Orleans on her intended voyage, and arrived at the place of destination, where part of her cargo was unladen, according to the terms of the contract; and whilst the crew were proceeding to discharge the balance, she was forced from her moorings by stress of weather, and compelled to put back to New-Orleans, where she arrived in a shattered and unseaworthy state, with a greater part of her cargo, some of which was in a damaged state, and was sold at the instance of the shippers. The vessel was abandoned to her insurers, was sold, bought in by Clark, one of the original owners, and repaired. While undergoing repairs, she was offered by her present owner to Vance, for the purpose of completing her voyage and earning the full amount of freight, as stipulated in the charter party, by an entire delivery of the cargo. This offer was neither accepted nor refused; but some time afterwards, the owner of the ship was about to cause a part of the cargo of the ship Spartan, which had been brought back in safety to the

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port *a quo*, to be shipped on board another vessel. To prevent this proceeding, the plaintiffs obtained an injunction, and had the goods sequestered, some in the hands of the collector of the port of New-Orleans, and others by the sheriff. The defendants answered, by stating the impossibility they were under, in the first instance, to land the goods at the place of destination, the injury to the ship by the perils and dangers of the sea, her condemnation, abandonment to the insurers, and sale, as an excuse for not forwarding the cargo in the chartered ship, and as giving them a right to cause the goods to be carried in another vessel, &c. They pleaded also in reconvention, and claim the whole amount of freight, as stipulated in the charter party. Their right to recover is denied *in toto* by the original plaintiffs in the injunction and sequestration. On these issues, and the evidence adduced, the cause was tried in the court below, when a judgment was rendered against the owners of the ship, from which they appealed.

The material facts of the case, are those stated and admitted by the pleadings. The

charter party was not made in such a manner as to give to the freighters a temporary ownership of the vessel. All things necessary for the voyage were provided by the owners; the ship was managed by seamen procured by them, and was under the command of a master by them appointed, who signed bills of lading for all the goods. A small part of her cargo was delivered at the port of destination, estimated at about one-eighth; the balance was brought back to New-Orleans, the port *a quo*, some damaged and some sound; the damaged goods were sold, after a survey of the port wardens, had at the instance of the freighters; those which were sound, the owners of the ship which had been chartered, were about to send to their place of destination in another vessel, but were prevented by injunction, as above stated. The note from Clark to Vance, in which the offer of the ship Spartan (after she should be repaired) is made to complete her voyage, by carrying the remainder of the cargo to the destined place, is dated on the 9th June, 1828. To this no reply appears to have been made; but on the 10th of July, Vance addressed a note to Clark, by which he protest-

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ed against shipping his goods on any other vessel, and required them to be carried in the Spartan, in pursuance of the charter party, or he should consider himself absolved from all liability under his contract of affreightment, &c.

On these facts, the questions for solution are: 1. Whether the owners of the Spartan are entitled to the full freight, as stipulated in the contract of affreightment? 2d. Whether they can recover a *pro rata* freight? and if so, how much?

Owners of vessels, according to the general rule on the subject of freight, are not entitled to it, until after a delivery of the goods at the place of destination, according to the charter party. The conveyance and delivery of the cargo is a condition precedent, and must be fulfilled. A partial performance is not sufficient, nor can a partial payment, or rateable freight be claimed, except in special cases, and those cases are exceptions to the general rule, and called for by principles of equity. 3 *Kent's Com. p.* 173.

It seems, also, to be a general rule on this subject, that when a voyage is broken up by ordinary maritime perils, and the cargo be

brought back, the charter party is dissolved, and no freight is due. (*See same authority, p.* 176, *and the authorities therein referred to.*)

In the course of the argument of this cause, it was admitted on both sides, that the ship Spartan was to be considered, in this port, after her return, as in the situation of a vessel in an intermediate port, between the *termini* of her voyage, where she had put in from stress of weather, and to repair damages. In this situation, the owners had a right to retain the cargo until the ship should be repaired, and might be in a condition to proceed on her voyage, and earn full freight, if the necessary repairs could be completed in a reasonable time; and if that could not be effected, to cause the cargo to be transported in another vessel. If the latter course of conduct was one of necessity, they ought to have pursued it immediately, and transferred the whole remainder of the cargo to the vessel thus employed for its transportation to the destined place, in the least possible delay. But a change of vessels in this manner, so as to bind a freighter to the payment of full

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freight, is only tolerated by absolute necessity. See 1 *Gal. R. p.* 444.

Now according to the evidence of this case, no attempt was made by the owners of the chartered ship, to send her cargo in another vessel, until after the necessity of such a change of vessels had ceased. On the 9th of June, the original ship was offered to complete her voyage, according to the stipulations of the charter party, so soon as she should be fit to proceed to sea, being then under repairs. No further communication appears to have taken place between the contracting parties, until the 10th of July, when Vance having discovered that Clark was about to send a part of the cargo of the Spartan to its destination, on the schooner Hetta, protested against that conduct, and required the use of the former vessel.

The necessity of change or transfer of these remaining goods, from the vessel which had been chartered to any other, for the purpose of being conveyed to their destination, having at that time ceased, the freighter had a right to require that they should be carried in the chartered ship, or as to them, to consider the contract of affreightment as dissolved.

The owners of the vessel are therefore evidently not entitled to full freight. Are they entitled to a rateable freight? and by what ratio is it to be ascertained? Neither of these questions are without their difficulties. The first is doubtful on legal principles, and the second is somewhat embarrassed by the peculiar facts and circumstances of this case.

The right "to a rateable freight is based on two grounds: 1. When the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination. 2. When she has not performed her whole voyage, and the goods have been delivered to the merchant at a place short of the port of delivery. In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers. The contract, in such a case, is divisible in its own nature.—But if the ship be chartered at a specific sum, for the voyage, and she loses part of her cargo by a peril of the sea, and conveys the residue, it has been a question, whether the freight could be apportioned. The weight of authority in the English books, is against the apportionment of freight in such a case, &c.

In the case of a general ship or one chartered for freight to be paid according to the quantity, freight is due for what the ship delivers.

But if the ship be chartered at a specific sum for the voyage, the freight cannot be apportioned, unless in special cases.

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The stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment be claimed, *except in special cases.* 3 *Kent's Com. p.* 80 & 81.

Now if there be any case, in which a partial payment can be legally claimed, under a contract of affreightment by which the whole vessel is let, we are of opinion that the present furnishes one. It is true, that by the charter party, the whole of the ship Spartan was let to the freighters, except the cabin; the vessel was by them to be filled up, and they bound themselves to pay freight, at the rate of so much per barrel of five cubic feet; this rateable freight was afterwards estimated at a gross amount or sum, fixed and certain for the voyage.

The cargo was composed of dry goods, flour, corn and lumber, which would have been subjected to admeasurement in adjusting the freight. This labor was dispensed with, by aggregating the freight, which would have been erased on each seperate barrel or five cubic feet, into one whole of two thousand seven hundred dollars. If a rateable freight be allowable, the ratio by which it may

be fixed, on the part of the cargo delivered at the place of destination, must be taken in relation to the whole, and in relation to the gross sum agreed on, as freight for the entire cargo.

Abbot, in his Treatise on Shipping, at *page* 300, *part* 3, *chap.* 7, *sec.* 9, after stating the doctrine to be against any apportionment of freight, in a case where a ship is chartered at a specific sum for a voyage; according to the opinion of lord *C. Hardwick*, as expressed in the case of *Paul* vs. *Birch and others*, 621; and to that of *Malyn*, supported by the authority of the case of *Bright* vs. *Cowper*, 1 *Brownlow*, *p.* 21; proceeds to say, that if the question should again arise, the determination of it would depend on the particular words of the charter party; for without a very precise agreement for that purpose, it seems hard that the owners should loose the whole benefit of the voyage, when the object of it has been in part performed, and no blame is imputable to them. In *Post* vs. *Robertson*, (1 *John.* 21,) the court held, that when a ship is chartered, for a specific sum for the voyage, the general rule is, that if part of the cargo be lost by the perils of the

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sea, and part conveyed to the port of destination, there can be no apportionment of the freight under the charter party. By this is intended, that no recovery can be had on the charter party itself; for a majority of the court inclined to the opinion, that there might, in another form of action, be a recovery of freight, in proportion to the amount of goods brought home. *Note to p. 300, of Abbot.*

The words of the charter party, now under consideration, do not appear to us to be so restrictive as to render the contract indivisible; and we are not prevented from pursuing the equity of the case, by any technical rules in relation to the forms of actions, as followed in common law courts.

We therefore conclude, that the owners of the ship are entitled to a ratable freight for the goods delivered on the beach, near to the mouth of the Rio Grande, the place of destination.

Those which were brought back to New-Orleans, are of two descriptions. For that part of them, which returned sound and remained unsold, and for the transportation of which to the place of destination, the ship

owners did not pursue the steps authorized by law under their contract, they are entitled to no freight. But a different question remains to be settled, in relation to the flour and corn which was damaged and sold on its return, at the instance and for the benefit of the merchants. And this leads us into an examination of the right of carriers to recover freight *pro rata itineris per actr.*

If the owner voluntarily receive the goods at an intermediate port, such an acceptance constitutes the basis of the rule for a *pro rata* freight.

The doctrine in this respect seems to be settled, that if the owner of the goods voluntarily accept them at the intermediate port, such acceptance constitutes the basis of the rule for a *pro rata* freight, *i. e.* if they be not forced on him by an illegal or violent proceeding. The flour and corn, in the present case, are not forced on Vance, by any illegal or violent proceeding. These articles were surveyed and sold at his instance, and it is presumed he received the price of them. The proceeding was voluntary on his part, to avoid a total loss. He is therefore to be responsible for a *pro rata* freight, if the port be really intermediate to which they were brought back. But how is that to be fixed in truth, as to these goods; no part of the voyage was performed, although the vessel went to the place of destination, and returned to the port

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a quo. The trouble and expense to the owners of the ship were probably great, but in relation to these articles, their labor has produced no benefit to the shippers. If, however, they had been left in the possession of the former, they might have saved the whole freight, by conveying them to their destined place. Having been prevented from doing this, by the latter, some rate of freight is due; the circumstance of their subtraction, may have caused the final failure of the voyage.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the defendants and reconvenors, here appellants, do recover from the plaintiffs, the sum of four hundred seventy-six dollars and ninety-three cents, being the full freight of that part of the cargo of the ship Spartan, which was delivered at the mouth of the Rio Grande; and also the sum of five hundred twenty-three dollars and seven cents, being half freight for the flour and corn, which was received and sold by Vance, one of the shippers at the port of New-Orleans; making together, the sum

of one thousand dollars; and that the original plaintiffs and appellees pay the costs of this appeal; those of the parish court, to be borne equally by both parties.

SUARES vs. *HIS CREDITORS.*

The act of 1817, requiring oppositions to the tableau of an insolvent to be filed within a limited time, does not apply to creditors who are not placed on the bilan.

APPEAL from the court of the parish and city of New-Orleans.

The appellant, a creditor of the insolvent, not placed on his bilan, opposed the homologation of the proceedings had before the notary. The court below set aside the opposition on the the ground that it was not filed within ten days. The opposing creditor appealed.

Eustis, for appellant.

The statute of 1817, does not apply to creditors of the insolvent, who are not placed on the bilan of the insolvent.

McCaleb, contra.

1. The judgment of the court below was correct: the meeting of the creditors was on

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the 7th of December, and the opposition did not appear on file until the 18th of the same month: act of 1817; Dreux vs. his creditors, 2 Mart. n. s. 57.

2. Robinson does not show himself a creditor. Suares in exhibiting a statement of his affairs, sworn to, negatives the fact, and the record affords no testimony that he had a claim.

PORTER, J. delivered the opinion of the court.

A meeting of the plaintiff's creditors took place before a notary public, and were returned into court. Before they were homologated opposition was filed by the appellant, but the court rejected it on the ground that it was not made within ten days.

The act of 1817, requiring oppositions to the tableau of an insolvent to be filed within a limited time, does not apply to creditors who are not placed on the bilan.

It appears, the party making the opposition was not put upon the bilan, and we are of opinion that the limitation on which the court below rejected the opposition, applies only to those who had notice, express or implied, of the proceedings. The appellant is not *in delay* for not objecting to that of which he had no knowledge. In the case of *Kirkland* vs. *his creditors*, the opposing creditor was a party to the *concursa* more than ten days before he made opposition. 7 *Mart.* 511.

It is has been urged there is no proof he is a creditor, but the rule taken on him did not require him to establish he was a creditor. It called on him to show cause why the opposition should not be dismissed, because it was not properly sworn to, and filed too late; thereby admitting his right on other grounds.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded to said court, with directions to the judge not to reject the opposition because it was filed too late; and it is further ordered that the appellee pay the costs of this appeal.

McCALL vs. MERCIER.

The right of commuting mortgages is granted only in respect to tacit or legal mortgages imposed by law on the estate of Tutors and Curators.

Whether it extends to tutors who were in office at the time of the passage of the act? *Quere.*

APPEAL from the court of the first district.

Eastern District. May, 1830.

McCall vs. Mercier.

In 1823 the wife of the plaintiff obtained against him a separation of property, and a judgment which operated a mortgage upon the whole of his estate. The wife afterwards died, leaving three minor children, of whom, the plaintiff was natural tutor. The plaintiff being desirous to free his estate from the effect of this general mortgage, obtained from the court of probates a decree, that, upon his executing a special mortgage in favour of the minors, upon a certain tract of land and slaves, the general mortgage should be released. The steps taken by the plaintiff to obtain this decree were strictly legal, and having in conformity therewith executed the special mortgage, he required of the recorder of mortgages to cancel the general mortgage. Upon his refusal to do so, the plaintiff applied to the court below for a *mandamus*. A *nisi mandamus* issued, commanding the recorder to cancel the mortgage, or to show cause on a given day why a peremptory *mandamus* should not issue. The recorder, having, in the opinion of the court below, shown good cause; the rule was discharged and the plaintiff appealed.

Pierce, for appellant.

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McCall vs. Mygatt.

1. A *mandamus* should issue. C. P. Sec. I, *mandamus*.

2. The proceedings are according to law. C. C. 3308; 9, 10; 331.

Dennis, for the appellee.

MATHEWS J. delivered the opinion of the court. This is an appeal from a decision of the court below, by which that court refused to grant a *mandamus* to the register of mortgages, requiring him to cancel and erase a judicial mortgage, which existed on all the estate of the plaintiff.

It appears by the evidence of the case, which is composed of written documents, that McCall's wife, in January 1823, obtained a separation of property from her husband, and a judgment against him for the sum of sixty-one thousand two hundred and four dollars and ninety-eight cents, with interest thereon at the rate of five per cent. per annum, as a privileged debt. This judgment affects all his property. The wife afterwards died, leaving three children, to whom the plaintiff is natural tutor. In consequence of his situation as such, there is also a tacit or legal mortgage on his estate. He

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being desirous to have these general, judicial and legal mortgages thus acquired in favour of his minor children, restricted to a portion of his immovable property, caused an under-tutor to be appointed for the minors, and proceeded through the regular steps pointed out by law, to obtain a decree of the court of probates, of the place where the succession of his wife was opened, ordering that he should execute a special mortgage on a certain tract of land and a number of slaves, and that the general, judicial or legal mortgage on all his estate should be released. The special mortgage was made in conformity with the decree of the court of probates, and on the exhibition of these documents, the plaintiff required of the recorder of mortgages to cancel the general mortgage, which the latter refused to do; and an application for a *mandamus* to compel him by order of the district court, was made by the former.

The commutation of mortgages, as claimed by the plaintiff in the present case, (his counsel contend) is authorized by an act of the legislature, passed in 1817, by which, a privilege is granted to tutors and

curators of minors, and to give special mortgages in certain cases therein prescribed. And also by the acts 331, *and* 3308 *of the La. Code.*

The minors, against whose right, the restriction, from a general to a special mortgage is claimed, appear to have two distinct species of hypothecation on all the property of their father; the one judicial, based on the judgment which their mother obtained against him, when a separation of goods was decreed; the other tacit or legal, in consequence of his situation as natural tutor. In relation to the first of these mortgages, none of the laws relied on by the plaintiff, gave the privilege of restriction or commutation. This right or privilege, is granted only in respect to the tacit or legal mortgages imposed by law on the estates of tutors and curators. The act of 1817, and the art. of 331 of the Code, provide for a substitution by special mortgage, in place of sureties; and consequently afford no rules for the government of the present cause, as a father or mother is not bound to give surety for tutorship. *See Moreau's Digest, vol. 2, p. 70, and the art. of Louisiana Code; not cited.*

The right of commuting mortgages is granted only in respect to tacit or legal mortgages imposed by law on the estate of tutors and curators.

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Whether it extends to tutors who were in office at the time of the passage of the act? *Quere.*

The art. 3308 seems to contemplate a right of change allowed to all kinds of tutors and curators, by substituting a special mortgage, for the general mortgage, which prevails on the whole of their estates. But it is believed that this law is not applicable to the situation of persons who assumed such offices previous to the enactment and promulgation. According to the constitution of the United States, no law can be passed which impairs the obligation of contracts. Our code also declares that, "a law can only prescribe for the future." It can have no retrospective operation, nor can it impair the obligation of contracts; article 8. There is an implied contract on the part of tutors and curators, prudently and honestly to discharge their duty as such; and the law as it stood previous to the provisions above referred to, accorded a general mortgage on all of their property, to secure the interests of those for whom they are bound to act. By accepting the office of tutor or curator, the officer consents to all the obligations imposed on him to secure a faithful discharge of his duties; and to the full extent of these obligations, he is bound to the persons for whom he acts. The right to a general hypotheca-

tion on all his estate is vested in them, which cannot be restricted or lessened without destroying this right, *pro tanto*, and thereby impairing the obligation of the contract. This doctrine was more fully developed in the case of *Sabatier & al. against their creditors. See* 6 *Martin, n. s. p.* 585 *and sequel.*

There is, however, no necessity for determining absolutely its applicability to the present case, as we are clearly of opinion, that the judicial mortgage which descended from their mother to the minor children of the plaintiff, is not subjected to be cancelled in the manner attempted in the present instance, by any law on the subject of mortgages.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

SMITH & AL. vs. PIERCE & AL.

The fact that the vessel of the plaintiffs was run aground while towed by a steam-boat, raises a presumption of negligence and misconduct on the part of the captain of the boat, which renders its owner liable to an action.

Owners of steam tow-boats are liable as common carriers.

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SMITH & AL. vs. PIERCE & AL.

APPEAL from the court of the first district.

This was an action to recover damages from the owners of the tow-boat Grampus, for having run the vessel of the plaintiff's ashore, while towing her to sea. The damages were laid at two thousand seven hundred and forty-six dollars and twenty-three cents, and the defendants pleaded the general issue.

The captain of the vessel testified, that about eight o'clock in the evening he was ordered by the Grampus, to put his helm two spokes to starboard, and to let it remain so until further orders. That there was a regular watch on his vessel during the night; and that the orders first received were not countermanded until after the vessel struck. That the night was clear and the surrounding objects distinctly visible. The vessel grounded on the right bank of the river about sixty yards from the shore. This testimony was corroborated by the mate and the seaman at the wheel.

On the part of the defendants, the pilot and mate of the Grampus, testified that the orders to the vessel were to keep her helm *three spokes* to starboard. That about six minutes before the accident, the vessel was ordered to starboard her helm, that the order was reiterated five or

six times, to which no answer was returned from the vessel. It appeared from the testimony, that it was customary, particularly in the night, for tow-boats to keep near the shore of the right bank in order to make the south-west pass, and that the Grampus, was in the usual and proper track. It further appeared, that the commander of the Grampus, was master of his profession, experienced in the business, and extremely diligent and attentive. The defendants requested the judge to charge the jury, that if no misconduct or negligence had been proven on their part, they were entitled to a verdict. The judge refused so to charge, and the defendants took their bill of exception. There was a verdict and judgment for the plaintiffs, and the defendants appealed.

Workman and *Pierce*, for the appellants, made the following points in the case.

1. The charge prayed by the defendants to be delivered to the jury, ought to have been made.

2. The owners of the steam-boat are not liable in this case for the alleged negligence or misconduct of the captain or crew of said boat, and the plaintiffs cannot recover, because they have

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not shown or alleged, that the said owners could have prevented the acts, from which the damages they claim are said to have arisen.

3. There is no evidence of negligence or misconduct of any other offence, or *quasi* offence against the captain or crew of said steamboat.

MATHEWS J. delivered the opinion of the court. This suit is brought to obtain reparation for damages, which the plaintiffs alleged they have suffered as owners of the brig Jesse, by the negligent and unskilful towing of said vessel by the steamboat Grampus, down the Mississippi, &c. The owners of the boat are made defendants. The cause was tried by a jury in the court below, who found a verdict for the plaintiffs, and assessed their damages to two thousand four hundred and fifty-eight dollars and sixty-five cents, for which, judgment was rendered and the defendants appealed.

The evidence of the case shows, that the brig was run aground near the shore of the river, whilst she was lashed to the steam-boat and whilst the latter vessel was in the act of towing her to sea for hire, according to the

usage in such cases. The answer contains a general denial of the allegations in the petition, and an averment that the defendants are not in any manner liable. It seems from the testimony taken in the cause, that an attempt was made on their part to prove that the accident occurred in consequence of the negligence and misconduct of the master and mariners on board the brig, and not that of the captain and crew of the steam-boat. In this, we are of opinion that they did not succeed; and even if such negligence had been proven, it is doubtful whether it would exonerate them.

There is a certain class of steam-boats called tow-boats, used by the owners in the business of towing vessels from New-Orleans down the Mississippi, to the Gulf of Mexico. This is the ordinary occupation in which they are employed, and are publicly offered to all persons who may choose to hire them for this purpose.

The first question of importance in the present case, arises out of the bill of exception to the opinion of the judge *a quo*, by which he refused to instruct the jury, that if no negligence or misconduct on the part of

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the master of the steam-boat had been proven in this case, the defendants are entitled to a verdict in their favor. It is perhaps doubtful, whether the refusal of the judge to comply with the request to charge the jury as stated in the exception, would under all the circumstances of the case, have been erroneous, allowing that the defendants are not, according to the nature of the business and trade which they carry on, subjected to all the severe responsibilities which are by law, imposed on common carriers. The fact proven that the brig of the plaintiffs was run aground, while under the direction and in towing by the steam-boat, raises a presumption of negligence or mismanagement on the part of the captain of the latter vessel, which makes the owners liable to pay for the damages consequent on this accident. And this presumption supports the claim of the plaintiffs, unless contrary proof had been adduced, showing at least ordinary care and diligence, such as is usually practiced by prudent men, which, the whole evidence taken together, does not establish. The boat was unnecessarily and imprudently near the bank of the river when the accident occurred. The main question

The fact that the vessel of the plaintiffs was run aground while towed by a steam boat, raises a presumption of negligence and misconduct on the part of the captain of the boat, which renders its owner liable to an action.

to be settled is, whether the owners of steam-boats, used for towing vessels, are to be held responsible as common carriers. This business is so new, that nothing strictly relating to the obligations imposed on those who pursue it, can be expected to be found in any legal treatise, or adjudged cases. Their just standing in this respect must be sought in analogy. Common carriers are those whose trade is to carry goods for hire. The trade of the owners of tow-boats in this city, is to convey, carry or tow vessels from this place down the Mississippi to its mouths, over the bar, and out to sea; and to bring from certain points near to those mouths, ships or vessels into the port of New-Orleans; and for these purposes they offer their steam-boats to serve the public for hire. According to this definition of a common carrier, and the description of the business and trade of the owners of tow-boats, it is not easy to distinguish the trade and occupations of the one from the other; and if these be similar, the same responsibilities should be attached to the conduct of both.

A distinction is attempted to be drawn between the towers of vessels by means of steam-

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boats and ordinary carriers, in consequence of the power which the rudders of the ships have over the course of the boats; and in support of this distinction we are referred to a case reported in 2 *Peters*, 150, as decided in the supreme court of the United States. That case had relation to slaves, and the summary of the decision is, (as stated by the reporter) that the law regulating the responsibilities of common carriers, does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not and cannot have over them the same absolute control, that he has over inanimate matter, &c.

If these be the reasons which influenced the United States court in that case, they certainly are wholly inapplicable to the present.

The undertaking of the steam tow-boats, is to carry inanimate matter, without intelligence and uninfluenced by any moral power.

The vessels which are towed are almost entirely passive. Steam is the power by which they are moved, applied indirectly through the agency of the boat which is under the direction and management of her captain. By the contract for towing, he is bound to carry them safely to their destination, unless pre-

vented by uncontrolable accidents, or such as are not within the control of human foresight or power. If the boat be so much under the influence of the rudder of the ship, it is the duty of the master of the tow-boat to look to it. His undertaking is to tow the vessel in safety, and he has a right to assume all the authority necessary to effect that purpose. The command and care of the vessel towed, should either be subject to his command whilst she is carried by his boat, or her rudder should be placed in the hands of one of his own men. We consider a vessel thus towed, as property carried for hire, in which her crew should not be viewed as having any lawful agency. How far acts on their part, contrary to the will of the master of the boat and injurious to the success of his undertaking, would exonerate the owners from liability, need not be enquired into in the present case.

Owners of steam tow-boats are liable as common carriers.

We are of opinion that the situation of proprietors of tow-boats and the business they undertake, cannot legally authorize a relaxation of the severity and rigour of the rules applicable to commoa carriers. They differ from pilots, whose business is to point out the

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course or channel to be pursued by a vessel coming into or going out of port. They are generally, persons licenced by authority of governments to follow that trade or employment, and are responsible for damages occasioned by their negligence or default; but perhaps may not be subjected to all the rigour of the law relating to common carriers, being a species of officers instituted by license, it is their duty to act when called on; whereas the towing of vessels by the owners of the steam-boats employed in that business, is done under contracts completely voluntary.

It is however, probable, that no great difference in the responsibility of pilots and towers of boats could exist. The accidents for which both might be bound to repair, the consequent damages, must, from the similarity of the undertaking, be in all instances much alike, and only excusable by uncontrolable events.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

BALDWIN *vs.* BRACY.

A consignee has no privilege upon goods until they are delivered, unless he has received a bill of lading, or letter advising him of the shipment.

The ownership of goods is not changed by a delivery to the master of the vessel, or to the consignee; they are however subject to the claim of the latter for advances.

APPEAL from the court of the parish and city of New-Orleans.

On the 5th February, 1829, the defendant, who is a planter in the state of Mississippi, drew upon A. & S. Fisk & Co. of New-Orleans, for two thousand four hundred dollars, *as an advance upon his crop of cotton.* On the 1st March, the cotton was put on board a steam-boat, with instructions to the captain to deliver it to A. & S. Fisk & Co., to whom he was also the bearer of a letter of advice: The captain testified that he signed no bill of lading, it not being customary in the Lake and Pearl River trade to do so. Before the delivery of the cotton or letter of advice to the consignees, the cotton was attached at the suit of the plaintiff. A. & S. Fisk & Co. having paid the draft and made other advances, intervened in the suit. There was judgment for the plaintiff

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in the court below, and the intervening party appealed.

Watts, for appellant, made the following points:

1. The cotton had received its destination from the owner, and the lien attached from that moment. The captain of the steam-boat was the agent of A. & S. Fisk & Co. to receive the cotton, and it is not usual to sign bills of lading in a neighborhood trade.

2. The letter of advice accompanied the cotton. It was attached after the owner had parted with possession and given its destination.

3. The draft was a special pledge and letter of advice, and that was in possession of claimant before the cotton arrived. It showed that the cotton was despatched to A. & S. Fisk and Co., and the money was a specific advance upon the cotton attached. If the consignees had failed, and Bracy wanted to stop it in *transitu*, he could only do it on payment of the advance. Skillman vs. Bethany, 2 Mart. n. s. 104; Armor vs. Cockburne, 2 Mart. n. s. 668; 17 Massachusetts Rep. 206; 5 Taunton, 73; 4 Par-dessus, 357-8.

McCaleb, contra.

Before any letter or bill of lading reached the consignees, the attachment was laid on the cotton, and must therefore hold it. N. C. C. 3214; 1 Mart. n. s. 261; 2 n. s. 104; 8 Mart. 486; 9 do. 297; 10 do. 48; 1 n. s. 284; 2 n. s. 104; 4 n. s. 668; 4 Dall. 281; 17 Mass. Rep. 197; 1 Common Law Rep. 20; Paley on Agency, p. 119; 1 Bosanquet & Puller, 563.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff caused to be seized under a writ of attachment, a certain quantity of cotton, on board the steam-boat Pearl River, which was consigned by the defendant to A. & S. Fisk & co. of this city, who intervened in the present suit, and claim a lien on the cotton on account of advances made by them to the consignor. The court below gave judgment in favor of the attaching creditor, from which the interveners appealed.

The evidence shows that the cotton seized was put on board the boat about the last of February or first of March, 1829, for which no bill of lading was given; but the captain of the boat had instructions to deliver it to A. and S. Fisk & co. to whom he was also the bear-

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er of a letter of advice: but neither the letter nor the cotton came into their hands before the seizure under Baldwin's attachment. On the 5th February of the same year, Bracy had drawn on the consignees for two thousand four hundred dollars, who accepted and paid his bill. On the face of this bill, the drawer requests it to be paid as an advance on his crop of cotton, said to be sixty-five bales.

Under these facts, the decision of the cause depends mainly on a proper construction of the *art.* 3214 of the *Louisiana Code.* According to this article, every consignee or commission agent who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances, with interest and charges on the value of the goods, if they are at his diposal in his stores, or in a public warehouse; or if before their arrival he can show by a bill of lading, or letter of advice, that they have been dispatched to him, &c. The privilege here allowed requires one of two things to create it—either that the goods should be in the possession of the consignee, or that he should have received a bill of lading, or letter advis-

A consignee has no privilege upon goods until they are delivered, unless he has received a bill of lading, or letter advising him of the shipment.

ing him of the shipment. In the present case neither one nor the other of these occurrences took place before the seizure of the goods by the attaching creditor: unless as contended for by the counsel of the appellants, the draft or bill of exchange, drawn by the defendant on the consignees, should be considered as a letter of advice, as it was received and paid previous to the shipment of the cotton. The drawer requests the payment of it as an advance on his crop of cotton, estimated at 65 bales, but he gives no advice of its actual or even intended shipment at any particular period. The bill was honored and paid by the drawee, more than twenty days before the cotton was put on board the boat.

Such being the circumstances attendant on this letter of exchange, it cannot, without a most strained and unreasonable construction, be considered as a letter of advice relative to the consignment of the cotton. The claim of the appellants is therefore not supported by this article of the *Code*. Neither can these pretensions be aided by the actual delivery of the cotton to the master of the steam-boat, for the purpose of being conveyed and delivered to them as consignees.

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If they had been purchasers of the cotton from Bracy, at a stipulated price, and the latter had forwarded it to them, perhaps a delivery to the person who undertook to carry it, might be considered as a delivery to the vendees, even without an order to that effect, and would have screened them against attachments of the creditors of the vendor.

The ownership of goods is not changed by a delivery to the master of the vessel, or to the consignee; they are however subject to the claim of the latter for advances.

It cannot, however, be pretended in the present case with the least semblance of truth, that the mere delivery of the cotton to the master of the boat, changed its ownership. Bracy still remained the owner, and would have continued to be such, even after delivery to Fiskes', subject to their privilege for advances: previous to that event it was under the entire control of the owner, and liable to be seized by his creditors. This case differs in this respect from the case cited from 7 *Mart. n. s.* 137.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

DESFARGE & AL. vs. DESFARGE & AL.

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DESFARGE & AL.
vs.
DESFARGE & AL.

If the court direct the answer to be served on the plaintiff, and that he should answer the interrogatories, it is a conditional order, and the plaintiff is not bound to answer, until a copy of the answer be served on him.

APPEAL from the court of probates of the parish and city of New-Orleans.

A. M. Desfarge, by last will and testament, bequeathed to the defendants, his natural children, all his property in Louisiana; and to the plaintiffs, his brothers and sisters, all his estate in France; the will contained a declaration, that the property in France was much more considerable than that in Louisiana. Upon a liquidation of the estate in Louisiana, the defendants received one half, and were put in provisional possession of the other, upon giving bonds to refund the same to the plaintiffs.

To recover this provisional deposit, the present action was brought, and resisted by the defendants on the following grounds:—*First*, That by the laws, both of France and Louisiana, the testator was authorised to bequeath to his natural children, and they to receive from him, to the amount of one half of his property. *Second*, That the testator left an estate in

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France, far exceeding in value that in Louisiana, and of which the plaintiffs were in possession. To establish the second ground of defence, the defendants filed with their answer, interrogatories to be propounded to the plaintiffs; and on the 5th May, 1825, the court made the following order: "Let the answer of the defendants be served on the plaintiffs, and let them answer the interrogatories, as therein propounded." No steps were taken by either party to have the interrogatories served on the plaintiffs, and they remained unanswered. On the 6th February, 1829, the defendants' counsel had the cause set for trial, and prayed that the interrogatories might be taken *pro confessis*. The court below was of opinion, that the defendants should have caused the service of the interrogatories, and gave judgment on the merits in favor of the plaintiffs, from which the defendants appealed.

Seghers, for appellant.

Dennis, for appellee, urged the following points:

1. There was no occasion to answer the interrogatories propounded by the defendants.

2. The courts in this country, have no control over property situated in France.

MARTIN, J. delivered the opinion of the court. The will of the late A. M. Desfarge, the brother of the petitioners, and natural father of the defendants, free persons of colour, appointed one of the latter testamentary executor, and contains a bequest of all the testator's property in Louisiana to his said children, and all his property in France to the petitioners; and the testator avers, that the latter property is much more considerable than the former. The estate, in Louisiana, having been liquidated, the defendants obtained a surrender of the balance to them, on their giving bond and security to account for one half to the absent legal heirs.

On suit being instituted on this bond, they pleaded that the petitioners had in their possession estate of the testator much more valuable than what is now in the defendants' hands, and filed interrogatories, by the answer to which they sought to establish this fact. The judge directed the answer of the defendants to be served on the petitioners, and the latter to answer the interrogatories. Several years had elapsed after this, when the defendants' counsel had the cause set down for hearing, and at the trial contended, that as the inter-

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rogatories were not answered, they ought to be taken *pro confessis*. The petitioners' counsel urged, that the order to answer was conditional and contingent, dependent on the service of the answer, which had not taken place; and that if the order was absolute, still the interrogatories could not be taken *pro confessis*, as they were framed in such a manner as to render specific answers, to which affirmative or negative answers could not be substituted. The questions not being, whether an estate of the testator, equal to that in the defendants' hands, was not in the possession of the petitioners; but what was the amount of the estate of the testator, in the petitioners' possession? and the like.

If the court direct the answer to be served on the plaintiff, and that he should answer the interrogatories, it is a conditional order and the plaintiff is not bound to answer, until a copy of the answer be served on him.

On the first proposition, we think the petitioners had not an absolute right to have their interrogatories answered; and the judge's order was conditional or contingent, and the petitioners were not bound to answer, till served with a copy of the answer.

We are not ready to admit, that the form of the interrogatories would have prevented their being taken *pro confessis*, had the order been absolute.

But we are of opinion, that as the order was in an unusual form, the defendants, who in our opinion, had a legal and equitable defence, ought not to be the victims of the view which their counsel took of it; and more especially, as the will presents the idea which they rely on, of the testator having a larger estate in France than in Louisiana; and our remanding the case, may subject the petitioners to delay only, while our affirmance of the judgment may eventually deprive for ever the defendants of the provision for their support, left them by their natural father.

The legislature has made a provision for a case like the present, *Code of Practice*, 906. It has authorised us, when we believe we cannot definitively pronounce on the case, in the state in which it is, because the parties have *failed* to adduce the necessary testimony, to remand the cause.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and the case remanded, with instructions to proceed therein according to law, the appellees paying costs in this court.

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KENNER & AL. vs. THEIR CREDITORS.

If a tableau be homologated, in all parts which have not been opposed, &c. the homologation is absolute.

KENNER & AL. vs. THEIR CREDITORS.

APPEAL from the court of the parish and city of New-Orleans.

The facts are fully stated in the opinion of the court.

If a tableau be homologated, in all parts which have not been opposed, &c. the homologation is absolute.

PORTER, J. delivered the opinion of the court. The tableau of distributon in this case was returned into court, in the month of June, 1827. On the 22d of that month, and in the same year, several oppositions were filed to it. Among others, the executors of Benjamin Morgan, the heirs of Wm. Kenner, James Brown, and J. Humphreys, opposed the recognition on the tableau, of Thadeus Phelps & Co. as creditors.

On the 12th June, 1828, the following judgment was rendered by the parish court: "It being proved to the satisfaction of the court, that the rule taken on the creditors and others, to show cause why the tableau of distribution, filed in the premises, should not be homologated, had been duly published according to law; therefore, it is ordered by

the court, on motion of George Eustis, Esq. of counsel for the syndics herein, that the said tableau of distribution be homologated and confirmed in all and every respect, in which they are not opposed by the different creditors who have filed their opposition thereto.

On the 11th of February, 1830, the cause was set for trial, on the opposition of Brown, Humphreys, Morgan's executors, and others, and no proof having been offered by them in support of their allegations, the court directed their opposition to be dismissed, and the tableau, so far as it regarded the claim of Phelps & Co. to be confirmed.

Six days previous thereto, however, an opposition was filed by the appellants to the tableau, on the same grounds as those set forth by Humphreys, Morgan and others. It was set for trial on a subsequent day, and the judge being of opinion it was filed too late, dismissed it. From that decree, the present appeal is taken.

On behalf of the appellants, it is contended, that their objections to the tableau did not come too late; that the court, in its judgment of 1828, reserved the matters now contested, and that until a decree of

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homologation, signed by the judge, any creditor may contest the correctness of the tableau. 6 *Martin*, 652.

The reservation relied on, is in these words: "that the said tableau be confirmed, in all and every respect in which they are not opposed by the different creditors who have filed their opposition thereto," and we do not think, that on a fair construction of it, the appellant's case is sustained. Its phraseology does not certainly possess all desirable clearness, but we do not think it was intended to reserve to creditors, other than those who had already made opposition, the right of opposing it at a future time. The delays too frequently attending the settlement of insolvents' estates, are often a source of great expense, and work a serious injury to all concerned. Unless, therefore, the judgment now under consideration, clearly extends the time of making objections to the tableau, further delay should not be allowed. To our minds it is doubtful, and we cannot open the case for further litigation. If we did, the insolvents' estate would not be much nearer settlement than it was two years ago. It is now, we believe,

nearly five since the bilan was filed. If the appellants considered, that the opposition made by other creditors on this ground, dispensed them from the necessity of filing one, they ought to acquiesce in the judgment rendered. If they did not, they had two years to present their objection, and at the end of that time, we think it would be a great hardship to the other creditors, to await the litigation of this question, before a dividend could be made.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

SERAPURN vs. LA CROIX.

The purchaser of mortgaged premises is not subrogated to the mortgagee's right, although he pay the price to the mortgagor, who immediately and in his presence pays it over in discharge of the mortgage.

It is immaterial, whether the mortgagor use his money, or any other, to discharge the mortgage.

Judgment against the tutor is *prima facie* evidence against a third possessor, but if collusion be pleaded, and it be denied that the tutor was not chargeable for any thing, evidence to the contrary must be produced by the minor.

8 MR 442 - 8 LR 197

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SERAPURN
vs.
LA CROIX.

APPEAL from the court of the parish and city of New Orleans.

The plaintiff having obtained a judgment against her mother and guardian for her portion of her father's estate, sought to satisfy the same, by the seizure and sale of a house and lot, which her mother had purchased after the death of her father, and subsequently sold to the defendant. It was proved, that the father of the plaintiff left a considerable property, and that the mother administered on the estate of her children.

The defence set up was, that the purchase money, paid by the defendant for the house and lot in controversy, having been employed by the mother of plaintiff to pay her vendor a balance due, he, the defendant, became of right subrogated to the privileges of the vendor of the plaintiff's mother. The evidence showed, that a balance of seven thousand dollars was due from the mother of the plaintiff to her vendor, and that when the defendant purchased the property, *he*, the defendant, the mother of the plaintiff, and *her* vendor, went before a notary, in whose presence the defendant paid to the plaintiff's mother the price of the sale, six thousand dollars in cash, and furnished his notes for

the remainder. *She* immediately, in presence of the notary and witnesses, paid to her vendor the balance due, who gave her a receipt in full, and released the mortgage on the property. On the trial the defendant offered a witness, to prove that the money paid by the plaintiff's mother to her vendor, was the same money which at the same moment was paid by the defendant for the property. The court refused to admit the evidence, and the defendant excepted. The court also (notwithstanding the defendant's objection) permitted the plaintiff to read in evidence the record of the suit of the plaintiff against her mother. There was judgment for the plaintiff, and the defendant appealed.

Dennis, for appellant.

1. The subrogation in favor of the appellant took place of course, and independent of the will and consent of the other parties. Old C. C. p. 29, art. 151.

2. The court erred in rejecting the evidence offered.

3. The judgment of the plaintiff against her mother, ought not to be proof against third persons.

Canon, contra.

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SERAPURN
vs.
LA CROIX.

1. A mother has no right to purchase property for her minor child.

2. A minor can neither alienate nor purchase, without the authority of justice. Sarupurn vs. Debuys, 6 Mar. n. s. 18.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to obtain satisfaction of a judgment against her mother and tutrix, by the seizure and sale of a house and lot, purchased from the latter by the defendant.

He resisted her intentions, under a legal subrogation to the right of the mother's vendor, to whom he alleges he has paid six thousand dollars, the balance of the consideration of the sale from this vendor to the plaintiff's mother. The plaintiff contends, this sum was paid by the defendant to her mother, as the consideration of the sale between her and him; and that he did not pay her mother's vendor, but on the contrary, she, the mother, after having received the defendant's money, paid a larger sum to her own vendor, on the balance of the price due to the latter.

There was judgment for the plaintiff, and the defendant appealed.

The facts of the case, as they appear from the record, are, that the plaintiff's mother, having purchased the premises, while she was the plaintiff's tutrix, for twenty thousand dollars, six thousand dollars of which she paid down, and had a time for the balance, giving two notes of seven thousand dollars each, payable at six and twelve months, and afterwards sold the premises to the defendant, through the ministry of the register of wills, for twelve thousand dollars, payable six thousand dollars in cash, and the balance in two notes of three thousand dollars each, at six and nine months. After the adjudication, the defendant, the plaintiff's mother, and her vendor, went before a notary, in whose presence the defendant paid to the plaintiff's mother the said sum of six thousand dollars in cash, and delivered her his two notes for three thousand dollars each, and she immediately paid, in the presence of the notary and witnesses, the sum of seven thousand dollars, to her own vendor, who acknowledges to have therefore received another sum of seven thousand dollars, in discharge of the two notes of the plaintiff's mo-

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ther, gave her a discharge of the balance due on the premises, and consented to the radiation of the special mortgage she had for the payment of the balance.

On these facts, the appellant's counsel has contended, that it is apparent from the attendance of the vendor of the plaintiff's mother before the notary, the payment of six thousand dollars in cash, and the delivery of two notes for three thousand dollars, together with the immediate payment received by the plaintiff's mother's vendor, that the appellant gave his money to her for the purpose of her immediately paying her own vendor, which was accordingly done; and hence it has been urged, that the appellant, being the owner by the adjudication of the premises, had interest to discharge the mortgage which the former vendor had thereon, and the mortgage having been discharged out of his the appellant's money, he is legally subrogated to the mortgagee, as effectually as if he had directly paid the money into the mortgagee's hands.

The purchaser of mortgaged premises is not subrogated to the mortgagee's

The parish court thought differently, and we think correctly. The appellant's aim was to have the original vendor's mortgage

discharged, and the entry of it in the books of the register of mortgages erased, for by an act to which he was a party, the mortgagor discharged the mortgage, and consented to his mortgagor having the registry of it erased. The appellant's money became *eo instanti* that he paid it, her immediate vendor's money, and she nor he paid it in discharge of the mortgage.

right, although he pay the price to the mortgagor who immediately and in his presence pays it over in discharge of the mortgage.

Our attention has been called to two bills of exceptions to the opinion of the court, who refused evidence of the plaintiff's mother having discharged the mortgage, by the payment of the very money she received from the appellant.

The other, to the admission on evidence (notwithstanding the appellant's objection) of the record of the plaintiff's suit against her mother.

The parish court, in our opinion, did not err. It was immaterial whether the appellant's vendor used the money he had just paid her, or any other money of her own, to pay her debts to her mortgagee.

It is immaterial, whether the mortgagor use his money, or any other, to discharge the mortgage.

The record of the suit against the plaintiff, is *prima facie* evidence of the debt. Had the appellant pleaded collusion and

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SERAPUER vs. LA CROIX.

Judgment against the tutor is *prima facie* evidence against a third possessor, but if collusion be pleaded, and it be denied that that the tutor was not chargeable for any thing, evidence to the contrary must be produced by the minor.

fraud, and that nothing was due to the plaintiff by her mother; this, as it might not be directly proven, and must have been met by evidence of an actual debt, might have thrown the burden of the proof on the appellee.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

WILSON vs. McHUGH & AL.

Where the plaintiff failed to make out his case, judgment of non suit was properly rendered.

APPEAL from the court of the parish and city of New-Orleans.

The plaintiff alleged that he purchased of McHugh, a tavern establishment with its furniture, fixtures and stock. That he remained in possession thereof about five months, when during a temporary absence from the state, and while the establishment was in charge of his agent, McHugh took forcible possession, and sold it to Sears, the other defendant. He prayed that the defendants be decreed to deliver up the establishment together with damages. The defendants pleaded the general issue.

It appeared from the evidence, that McHugh had agreed to sell out the establishment to the plaintiff, who was his bar keeper, but no price was fixed upon. After this agreement to sell, the plaintiff carried on the business in his own name, furnished supplies and paid the rent. That prior to his departure from the state, an inventory was taken of the furniture and stock to enable the plaintiff to come to a settlement with McHugh, but it did not appear that any settlement ever took place. After the departure of the plaintiff, McHugh took possession of the establishment, and as stated in the petition, sold it to Sears, the other defendant. There was judgment of non-suit in the court below, and the plaintiff appealed.

Roselius, for appellant, assigned for error.

1. The court below erred in giving judgment of non-suit, because, as regards moveable property, delivery and possession is the best evidence of the completion of the sale.

2. The plaintiff is entitled to recover the damages claimed, because there is sufficient proof on the record to establish the loss sustained by him. Durnford vs. the syndics of Brooks, 3 Mart. Rep. 322, C. C. art. 1916,

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WILSON vs. McHUGH & AL.

1917, 2243. Pothier *con de vente* No. 319. Toulier vol. 7, p. 54, No. 35.

Sterrett, contra.

To constitute a perfect sale, three things are necessary: the thing sold, the price and the consent; and there is no proof that any price was fixed upon. C. C. art. 2414, 2437.

MARTIN J. delivered the opinion of the court. The plaintiff sets forth he purchased from the defendant McHugh, a tavern establishment with the furniture, fixtures and stock, and was put in possession thereof, and afterwards, in his absence, the said defendant illegally possessed himself of the premises, and sold and delivered them to the other defendant. The petition concludes with a prayer for damages.

The defendants severed in their pleas; they both pleaded the general issue; but the last defendant added thereto a plea of reconvention.

There was a judgment of non-suit, and the plaintiff appealed. His counsel has assigned as errors apparent on the face of the record, that,

1. The court erred in non-suiting him, as

with regard to personal property, delivery of possession is the best evidence of the completion of the sale.

2. The plaintiff was entitled to damages, as there was evidence of the loss he sustained, and the profits he was deprived of, as there is a statement of facts, we have examined the case on the merits, independently of the assignment of errors.

From the testimony, the judge *a quo* has concluded no complete sale took place, as it does not appear that any price was agreed on. The plaintiff was in possession of the premises as bar keeper of the defendant Wilson, who entered into some arrangements for a sale; during this period the plaintiff, continuing as bar keeper to be in possession. After his departure, the defendant McHugh, seeing the bargain had not been brought to a conclusion, sold to the other defendant.

Where the plaintiff failed to make out his case, judgment of non suit was properly rendered.

Such is the view the inferior judge has taken. The testimony is far from being complete either way, but in our opinion preponderates in favour of the defendant.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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LOUISIANA BANK
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LOUISIANA BANK vs. KENNER'S SUCCESSION.

Whether stipulations in contracts of partnership, by which they may be continued after the death of one of the partners, for the benefit of his heirs, be binding on the latter, without their consent? *Quere.*

According to the laws and usages of commerce, as they prevailed at the time of the adoption of the Code of 1808, no stipulation could be made by partners, absolutely binding on the heirs of one of them who should die, to continue the partnership after his death, and be made responsible for contracts made in the partnership name.

APPEAL from the court of probates, of the parish of Orleans.

This was an action to recover from the estate of William Kenner, deceased, twenty-nine thousand seven hundred and sixty-six dollars and twenty-six cents, being the amount of three promissory notes, drawn by the commercial firm of William Kenner & Co. to the order of Morgan, Dorsey & Co. and by them endorsed to the plaintiffs.

The defence set up, was, that the partnership of William Kenner & Co. was dissolved by the death of Kenner, prior to the execution of the notes, and that after his death, the surviving partners were bound to liquidate the partnership as soon as possible, and had no right by law or otherwise, to enter into any new contract

in the name of said partnership, so as to bind or affect the estate of the said William Kenner.

It appeared from the evidence, that, on the 5th May, 1824, the partnership which had previously existed between Kenner, Clague and Oldham, under the firm of William Kenner & Co. was continued for the period of three years, and in the articles of copartnership *then* entered into between the said partners, was the following clause. "Should any one or more of the said partners die before the period stipulated for the ending of said partnership, such death or deaths shall not operate a dissolution of the same, in any manner whatever; but the same shall continue until the expiration of the said period, between the surviving partner or partners, and the heir or heirs of such deceased partner or partners; and the said surviving partner or partners shall, and may continue to use the name of said firm as now established; to remain in possession of and sell, negotiate and disposed of and generally to administer all the property, moveable and immoveable; all the effects, moneys, rights, credits and debts, and other means thereof, in the same manner as if the said parties were all living, until the expiration of the said period, and to wind up

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and liquidate the affairs of said partnership, and render an account thereof, when thus liquidated to the heirs or representatives of such deceased partner, or partners."

It was admitted that William Kenner died, on the 14th of May, 1824, leaving six children, all minors; and that the notes sued upon, were dated in 1825. There was judgment for the defendants, and the plaintiffs appealed.

Livermore, for appellants; *Mazureau*, for appellee.

MATHEWS, J. delivered the opinion of the court.

In this case, proceedings were commenced in the court below, to recover from the succession of the deceased, the sum of twenty-nine thousand seven hundred and sixty-six dollars and twenty-six cents, on account of several negotiable notes purporting to have been executed and signed by the commercial firm of William Kenner & Co. The defence, on the part of the succession, is a dissolution of the partnership, previous to the making and signing of the notes in its name, by the death of Kenner. The court of pro-

bates gave judgment against the claim of the plaintiffs, from which they appealed.

The evidence of the case, and facts admitted, show, that a commercial partnership had existed between William Kenner, Richard Clague and John Oldham, carrying on trade under the name and firm of William Kenner & Co. up to the 5th of May, 1824; which was at that date continued by agreement, entered into between the partners, for the space of three years thereafter. On the 14th of the same month Kenner died, leaving six children, all minors. The notes of which the plaintiffs claim payment from his succession in the present action, bear date in the year 1825, after his death; and were executed in relation to new contracts, made by the surviving partners, who used the partnership name in signing them, in consequence of power to that effect, given by the terms of the 7th art. of the contract, by which the partnership was continued. It is expressed in the following words. "Should any one or more of the said partners die, before the period stipulated for the ending of the said partnership, such death or deaths, shall not operate a dissolution of the same, in any manner

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whatever, but the same shall continue until the expiration of the said period, between the surviving partner or partners, and the heir or heirs of such deceased partner or partners; and the said surviving partner or partners shall, and may continue to use the name of said firm as now established; to remain in possession of, and sell, negotiate and dispose of, and generally to administer all the property, moveable or immoveable, all the effects, moneys, rights, credits and debts, and other means thereof, in the same manner as if the said partners were all living, until the expiration of the said period; and to wind up and liquidate the affairs of the said partnership, and render an account thereof, when thus liquidated to the heirs or representatives of such deceased partner or partners."

The 8th art. requires, that efforts should be made to bring the concerns and dependencies of the partnership *into as narrow a compass as possible* before the period at which it was to close. Profits and losses at its termination were to be taken into account, from the 1st day of December, 1820, until the time limited for its duration, &c.

According to these stipulations, the counsel for the appellants contended, that the surviving partners had a right to use the name and style of the firm in transacting commercial business to any extent that they might deem proper, and that the heirs of William Kenner, the deceased partner, are bound *in solido* with the survivors, by all notes or other instruments in writing, executed in the partnership name, in pursuance of the contract by which it was continued, although such business may have been transacted, and the name signed to the notes, &c. since the death of their father.

In support of this proposition, reliance is had on the Old Civil Code, and on the commercial laws or usages of England, of Scotland, of the United States, of France, of Holland, of Germany, and those which have been understood as existing in Louisiana.

We have examined the authorities cited, to show the laws and usages in these foreign governments, in relation to questions analogous to that which is now under discussion; and they seem to authorize stipulations in contracts of partnership, by which they may be continued after the death of one of the part-

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Whether stipulations in contracts of partnership, by which they may be continued after the death of one of the partners, for the benefit of his heirs, be binding on the latter, without their consent? *Quere.*

ners, for the benefit of his heirs. But whether they would be binding on the latter, without their consent or acquiescence, is perhaps doubtful. In relation to minors, to whom the law does not attribute the power of willing, or consenting, the principle contended for by the appellants, would involve great difficulty, if not legal absurdity in their consequences. Heirs are bound to discharge the obligations of their ancestors, contracted by the latter while living, to the extent of the property which they inherit. But the power of an ancestor, (particularly according to our laws, relating to forced heirs,) to confer a right on other persons to make contracts after his death, by which his heirs should be bound even in reference to property inherited, to say the least of it, is very doubtful on general principles of law and justice.

In opposition to the consequences and effects assumed by the plaintiffs as giving them a right to recover the sum claimed from the heirs of Kenner, under the provisions of the *Old Civil Code*, as laid down in *art.* 50, *p.* 400. The counsel for the latter relies on *art.* 61, found on the same page, and on the

laws of Spain, relating to commercial partnerships. He insists, also, that a just and proper interpretation of the contract of partnership, will restrict the power of the surviving partners to mere acts of administration of the property, credits and debts, which appertained to it at the time of the death of the principal partner; and that his intention as evidenced by the contract of the two last articles of the agreement was to continue the survivors in the exercise of the powers granted for the sole and only purpose of winding up and settling the affairs of the concern, and not to enter into new and extensive transactions. After a strict examination of all the words and clauses contained in these articles, we have, (although not without hesitation,) come to the conclusion that they did authorize the surviving partners to contract new obligations in the name of the firm as it stood previous to the death of Kenner, and that the acts in this respect are obligatory on his heirs, if it be admitted that he could legally constitute them his successors in the partnership. And this compels us to enter into an investigation of the legal principles adduced in support of the claim, and those which are offered to destroy it.

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We have already noticed, in a slight manner, the laws of foreign states, and which may perhaps be considered as somewhat foreign to the present question, and giving but little aid in its decision. We will now examine those which have immediate relation to it.

By *art.* 50 of the *Code* above cited, it is declared that every partnership ends of right by the death of one of the partners, unless an agreement has been made to the contrary. According to *art.* 61, such a dissolution extends to the surviving partners, unless there be a contrary stipulation. In case of a continuance between the survivors, *art.* 52 provides for the rights of the heirs of the deceased partner. These rules are found in the *title of the Code* which treats of the different manners in which partnerships end. And *art.* 61 declares that its provisions apply to commercial partnerships, inasmuch only as they do not contain any thing contrary to the laws and usages of commerce.

If the laws and usages of commerce which were in force in this country at the time of the adoption of the *Code* of 1808, contained rules contrary to those expressed in the *Code*

in the title from which these articles have been extracted, the former laws must govern, should any effect be given to the *art.* 61. Consid ering its provisions in comparison with those of *art.* 50, as creating an antinomy, the last *art.* 61, must prevail, on the rules of construction that prior laws are abrogated by posterior, which may be properly extended to different clauses in the same law.

We must now enquire what were the laws and usages of commerce in relation to commercial transactions, and particularly as to their effect on partnerships of this nature, which governed in this territory or state, at the period when the *Old Civil Code* received legislative sanction.

Soon after the second grade of government was conferred on the territory of Orleans, and the ordonnance of 1787, which had been made for the government of the territory of the United States north-west of the river Ohio had been extended to it, a dispute arose as to the laws which should be considered in force in this country.

In conformity with the fourth section of the act of congress, of the 2d March, 1805 pro viding for its government; and in pursuance

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of a general principle of the law of nations, that the former civil laws are retained by the inhabitants of a ceded state or province, until altered, modified or repealed by the legislative power of the government which has acquired the country; it was decided that the Spanish laws were to be regarded as affording rules for the settlement of civil contests between the citizens of the territory, so far as they were not incompatible with the political regulations of the United States, and were unrepealed by any authority. This decision has been acquiesced in ever since, and the laws of Spain have been considered as the laws of this state in relation to civil suits, until their entire abrogation in 1828 by an act of our legislature.

To show that the stipulation contained in the 7th article of the agreement to continue their partnership, made between Kenner, Clague and Oldham, is not binding on the part of the former, we are referred to the laws 1 & 15, *tit.* 10, *Partidas* 5. The first of these laws defines a company, or partnership, to be an union of men for the purpose of gain; formed by consent and agreement of those who desired to become partners. It

may be made for a certain time, or for the whole life of the partners. *Pero si algunos fazciessen compania entre si, tambien por ellos, como por sus herrederos valensi a quanto en su vida dellos, mas non passadas à sus herrederos, &c.*

The law 10, declares a partnership to be dissolved by the death of one of the partners, or by some other occurrences, much in conformity with the provisions of the *Old Civil Code*, and authorizes a stipulation for a continuance between surviving partners.

If the law which imposes this incapacity on partners to continue a partnership beyond their own lives, in such manner as bind their heirs by the contract, be considered as a law or usage of commerce existing at the time the *Civil Code* of 1808 was adopted, it controls article 50, of the title in that work, which treats of the manner in which partnerships end; for unless such an agreement could have been validly made according to the laws and usages of commerce then in force: the contract now under consideration is not binding on the appellees in consequence of *art.* 61 of the title referred to.

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It is certainly desirable for the convenience of merchants that the laws and usages which govern commercial contracts, should be similar in the different countries between which a trade of this species is carried on, and more especially is it to be desired that an uniformity in this respect should prevail in commercial business carried on between the states of the Union; and when no express statutory provision, or local usage exists to the contrary, general custom, as established by the decisions of competent tribunals ought to prevail. But no general usage can destroy the force and effect of local regulations, when the latter are formed in opposition to the former. The law of the *Partidas* in relation to partnerships, although it embraces those which may not be, strictly speaking, commercial, yet it certainly includes the latter: in this respect it is a law of commerce, and must be held paramount to the usage of all foreign countries, even those of the other states of our confederacy.

Opposed to the recognition of this principle in the present case, much argument was offered to the court, drawn *ab inconvenienti;* such as that indorsements of bills or notes in

blank, are not good according to the Spanish laws, and that partners are not bound in *solido* by their contracts; principles wholly contrary to the doctrine established by many decisions of the courts of the state. It is true that we have been in the habit of having our judgments relative to commercial transactions, or the usages of commerce, as they prevail in the U. S. and England and other commercial countries. No instance, however, can be adduced where violence has been done to any express provision of the laws of this state in any of these judgments or decisions. With regard to blank indorsements, they are prohibited by the ordonnances of Bilboa, alone, which never had the force of law in this province while under the government of Spain. As to the evil consequences so much apprehended by the counsel for the appellants in relation to the contracts of copartners being no longer considered as binding in *solido*, their fears for the future may be calmed by the recollection that all the Spanish laws were abrogated by the legislature in 1828. But according to a just interpretation of the rules as cited from the *Curia Philipica*, we are of opinion that there is no

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real grounds to apprehend inconsistencies or difficulties in reference to past contracts. These rules are expressed in *No.* 28 and 29, of the *Chapter* which treats on *compaños.*

In No. 28 it is declared, that when a partner contracts in his own separate name, other partners are not bound by such contract; for, to bind them, it is requisite that the name of the company should be used, and that the contract should be intended for the utility of the partnership. No. 29 is in the following words: "*un compania no pur de obligar a otro, se no es por la parte que le toca respecto de la compañia, salvo haviendo pacte entre illos de ello; ò quando los dos exercera una negociation en diversos pueblos: cada uno en el suyo que entonces, por le que cada uno de ellos negocia, ò contrata quedan intrambos obligados* in solidum, *por que el uno fue puesto por el otro para ello, y por el contrario. Y lo mismo por la misma razon es quando, el uno es puesto por los demas para una negociacion. Seguin unas decissiones de Genova, Alvaro Vacq y Morquicho.*

According to this authority, it might appear doubtful whether the signature of the company's name would bind all the partners

in *solidum*, unless it should be signed by some particular member authorized by the contract of association to use the name of the firm. But, on looking at the decisions referred to, it appears to us the matter is made clear, that an obligation in *solidum* is imposed on all the partners, by the use of the *nomen sociale* by any one of them. The moral or summary of the decision No. 15, *Rota Genua*, referred to amongst others by the *Curia Phillipica*, is expressed in these words: *Expendens nomen sociorum obligat quemlibet ipsorum in solidum.* No. 10 of this decision, "*Uno expendente nomen sociale, tam expendens quam cætere socii, in solidum obligantur.* No 12 is to the same effect, wherein a distinction is made between contracts signed by all the partners in their separate names, and such as are signed by any one of them. "*Expendens nomen sociale, tunc de mente Bartholi et alionum est, ad omnes socii in solidum obligantur sive in eadem sive in diversa sent civitate.* From these authorities we conclude that partners in a commercial company are, by the laws and usages of commerce, as understood in Spain, bound *in solido* by the signature of the com-

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pany, when used for legitimate purposes; and that, supposing these laws and usages to have been in force in this country prior to the year 1828, they did in no manner conflict with those which prevail in the U. States generally, in England and other commercial countries. Hence we also conclude, that no inconvenience can possibly arise in relation to the obligations of partners in a commercial firm, by deciding the present case in favour of the appellees.

In the case cited from 6 M. n. s. p. 290, it is true that the court, in delivering its opinion, stated it to be of frequent occurrence, that partnerships, by the terms of the contract, last after the death of one of the members, and are continued under the *nom social* for the benefit of his heirs. This may happen when the heirs are of age, and accept the benefit of a stipulation made in their favor, like any other third person, who would, perhaps, be at liberty to claim the benefit of such a stipulation. But we are clearly of opinion that, according to the laws and usages of commerce, as they prevailed in this country at the time of the adoption of the Code of 1808, no stipulation could be made by partners, ab-

According to the laws and usages of commerce, as they prevailed at the time of the adoption of the Code of 1808, no stipulation could be made by part-

solutely binding on the heirs of one of them who should die, to continue in the partnership after his death, and be made responsible for contracts made in the partnership name.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

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ners, absolutely binding on the heirs of one of them who should die, to continue the partnership after his death, and be made responsible for contracts made in the partnership name.

COX vs. BALDWIN.

The legal subrogation which is created by payment made by a debtor, who being bound with or for another, has an interest in discharging the debt, is as extensive as any express subrogation.

APPEAL from the court of the first district.

The commercial firm of Beale & Baldwin, which once existed in Kentucky, (and of which the defendant was a partner,) became indebted to Andrew Eliot and Co. of Philadelphia, in the sum of one thousand five hundred and eighty-five dollars and five cents, and upon the dissolution of the firm of Beale & Baldwin, Beale assumed the payment of the partnership debts.

After a judgment had been recovered against Beale alone, for the amount, one of the Eliots applied to the defendant, Baldwin, for pay-

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ment of their debt, and was answered that he would accept a draft from Beale for the amount. Beale accordingly drew a bill of exchange on the defendant, in favor of George Eliot, which was endorsed over to Andrew, who presented it to the drawer, and upon his refusing to accept, the bill was protested. Beale afterwards coming to New-Orleans, a bail writ was sued out against him as drawer of the bill, by Andrew Eliot, and Hawkins and McLean became his bail.

Beale having failed to pay the judgment obtained by Eliot, in May, 1822, proceedings were instituted against Hawkins & McLean, and judgment entered up against them for one thousand five hundred and eighty-five dollars and five cents, one half of which was paid by Hawkins.

McLean being insolvent, and execution having issued against Hawkins for the remainder of the debt, he obtained an injunction, and Cox, the plaintiff, became his surety on the injunction bond. Hawkins dying soon after insolvent, the injunction was dismissed, and Eliot having obtained judgment against Cox on the injunction bond, he was compelled to pay the remainder of the debt.

The petition concluded with a prayer, that as the debt for which the said Beale was originally held to bail, was a debt due by a commercial firm, of which the said Beale and the defendant, Baldwin, were the partners, and for which they were bound in *solido*, and inasmuch as by the payment of said debt, the plaintiff had been subrogated to the rights of the creditors, that the defendant might be condemned to pay him the amount claimed, with interests and costs.

There was judgment for the plaintiff and the defendant appealed.

McCaleb, for appellant, contended:

1. That when Andrew Eliot & Co. received the bill drawn by Beale in favor of a third person, (George Eliot,) and George Eliot transferred said bill to another third person by endorsement, (to wit, Andrew Eliot,) that he (A. Eliot,) swearing that the amount was due to *him*, sued upon *the bill*, obtained judgment and satisfaction of the bill, that the open account became merged in the bill, and that there was a novation of the debt. If a novation, then Baldwin is not bound, for it is one of the ways by which an obligation is extinguished.

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Here a *new debt* was contracted, which was substituted for the old one. A *new debtor* was substituted to the old one who was discharged, and a new creditor is substituted to the old one with regard to whom the debtor is charged. Old Code, p. 296, art. 173, sec. 1: 1 Evans Pothier, 390, 391; 12 Johns. Reps. 409; 11 Johns. Reps. 520; 5 Term Reps.; 7 Toulier, 335, Nos. 276, 277.

2. If there was no novation, yet the defendant contends that the plaintiff has never been subrogated to any rights which can make him liable to pay him—perhaps not even to rights against Beale. Old Code p. 288, art. 149, 151; 7 Toulier, p. 119, No. 97; Merlin questions de droit.

3. If plaintiff be subrogated to rights of Andrew Eliot and Co. upon Hawkins, and through Hawkins subrogated to rights upon Beale: still defendant is not liable to pay plaintiff, for he shows that Beale never could recover against him, defendant, because, at the dissolution of the partnership, Beale assumed the common debts; and because if he had not, Baldwin now holds Beale's notes, (spread upon the record,) which he could plead in compensation if he were sued by Beale.

Strawbridge, for appellee, contended:

1. Subrogation takes place of right for him, who being bound for others, or with others, has an interest in discharging the debt. Old Code, 290, art. 151; New Code, 2157; 7 Toulier, 191, No. 147; rights of surety against principal, whether with or without his knowledge. New Code, 3007-9, 3021-2; Old Code, 430, art. 14, 15; 7 Toulier, No. 147-8.

Subrogation equivalent to cession, 7 Toulier, p. 147, No. 119; transfers all accessaries, 7 Toulier, p. 147, No. 120; 4 New Code, 2615.

2. Novation not presumed, must be expressed: no performance of Baldwin's engagements, therefore no novation. Evans Pothier, p. 390; Old Code, p. 196, art. 173, 182; New Code, 2185, 2194; 8 Martin Reports, 422; n. s. 144.

3. Baldwin's engagement to accept was subsequent to the dissolution and agreement with Beale: a promise to accept before bill drawn, is, under circumstances, an acceptance. Chitty, 217, 8, 9; Bailey, 103, 4, 5.

Porter, J. delivered the opinion of the court. A. Eliot having obtained a judgment against Beale, proceeded against Hawkins, who was his bail. Hawkins procured an in-

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junction, giving Cox, the present plaintiff, as his surety. The injunction being dissolved, and Hawkins dying insolvent, the plaintiff paid Eliot the debt he had sued for. This is brought to recover from the defendant, who was partner of Beale, the debt due by the firm of Beale & Baldwin, which debt the plaintiff alleges he discharged.

The general issue was pleaded; the plaintiff had judgment, and the defendant appealed.

The statement of facts show, that a commercial partnership existed between Beale and the defendant in Kentucky, and they contracted a debt to Andrew and George Eliot, for which George Eliot received judgment against Beale alone in Kentucky.

The partnership between Beale and the defendant was dissolved on the first day of December, 1818. Beale assumed the payment of all the debts of the firm, and the defendant receiving $3287 in cash and notes, transferred all his rights in the concern to Beale.

In the same month, or soon after, the defendant was applied to for payment of the debt due to the Eliots, and he referred the

applicant to Beale, saying that Beale had funds to pay the debt, but that he, the defendant, would accept Beale's draft therefor. A draft was accordingly obtained on the 20th February, 1820, payable to the order of George Eliot, who indorsed it to Andrew. The defendant refused to accept it, and suit was brought against Beale, on which Hawkins became bail.

On this, the plaintiff's counsel contends, that his client, having as surety of Hawkins, the bail of Beale, paid to Eliot a debt, for which the defendant was bound in *solido* with Beale; he has been subrogated to the rights of the creditors, who received his money, and consequently may exercise them against the defendant.

By the article 151 of the *Old Code*, under which this transaction arose, subrogation takes place of right, for the benefit of him who being bound with others, or for others, for the payment of the debt, had an interest in discharging it. *C. Code.*

Art. 152 provides, that the subrogation takes place as well against the securities, as against the debtors.

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The plaintiff argues, in becoming bound for the partner of the defendant, I became bound for him. It was the same debt. I had an interest in discharging it, and the moment I did so, I became subrogated to all the rights of the creditor. He could have sued the defendant, and I of course can. The legal subrogation stands in place of the conventional. It is the same thing as if I had obtained an express subrogation of all the creditors' rights. There is no difference between a sale of the debt by the creditor, and a payment by one of the parties bound for it.

The defendant answers, you were never bound for me, nor with me. You became surety for the bail of my partner, which was a distinct engagement. Had I been sued on this debt, you could not have been sued with me as my surety. If an action had been brought against you, you could not have pleaded discussion of my property. When there are several debtors in *solido*, any one of them may give distinct sureties, and in such case they are not bound with, nor for the co-obligor. My partner is largely indebted to me: had he paid the debt I could

have pleaded compensation to his demand: you cannot, by discharging a debt due by him, acquire greater rights than he could by making payment.

The ground assumed by the defendant is apparently supported by Pothier, "When (says he,) the surety is only bound for one, of the debtors in *solido*, and not for the other, the surety, after he pays the debt, has only a direct action against him for whom he bound himself. He can only, as exercising the rights of his debtor, put in force those which that debtor might exercise against his co-debtors, and in the same manner. *Pothier, on Obligations*, 441.

At the time *Pothier* wrote, the co-debtor or surety, who paid the debt, might take a subrogation, but if he did not, there was no legal one. He was driven to the action *mandati contraria;* if he paid by the consent express or implied, of the principal debtor, or the action *contraria negotiorum gestorum*, if he paid without. We apprehend it is in relation to the right acquired by payment, without subrogation, the author is treating in the passage above cited; for in No. 427, he expressly states, that the surety, when

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he pays, may require of the creditor to subrogate him to all his rights, actions and hypothecations, as well against the principal debtor, for whom he has become surety, as against all the other persons who are liable for the debt.

The legal subrogation which is created by payment made by a debtor, who being bound with or for another, has an interest in discharging the debt, is as extensive as any express subrogation.

The legal subrogation which is now created by payment made by a debtor, who being bound with, or for another, has an interest in discharging the debt, is as extensive as any express subrogation could be. The enquiry then is, was the plaintiff bound with the defendant, or for the debt he owed? We think he was. The obligation he came under, as surety on the bond given to obtain an injunction, gave him an interest in discharging the debt due by Beale & Baldwin, and it appears the payment made by him, did discharge it.

As to the other ground of defence, that the debt was novated, we do not see any force in it. The bill was taken in a country where the common law is in force, and the debt was contracted under the same system. We understand it to be a very clear principle, in that jurisprudence, that the acceptance of a note or bill of exchange, does not extinguish the debt it is given to discharge.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

FITZ vs. HAYDEN.

An agent who in the discharge of his duties as such, takes by consent of the principal, a conveyance of property in his own name, while at the same time he is not the real owner, is not bound to sue for the possession of the property at his risk and expense, unless that possession has been lost through his fault. He fulfils his obligations, and discharges his duty by offering to reconvey when called on.

Appeal from the court of the parish and city of New-Orleans.

The facts in this case are fully given in the opinion of the court delivered by Porter, J.

The defendant was employed by the plaintiff several years since, to superintend and direct the building of a steam-boat at Cincinnatti, in the state of Ohio, where the defendant resided. The plaintiff made advances and the work was proceeded in. Before the boat was completed the plaintiff became insolvent. Desirous to protect the defendant from any injury he might sustain in consequence of advances on behalf of the boat, the plain-

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tiff made an absolute conveyance to him and others who were concerned in her construction, of all his right, title and interest therein. After the conveyance the defendant proceeded to have the boat completed under the direction, and with the assistance of an agent whom the plaintiff sent to Cincinnatti. The one third of the boat which had been sold by the plaintiff on the eve of his insolvency as already stated, was by conveyances to which all parties assented, vested in one Talbot.

The vessel was called *La Belle Creole*, and at the time she was finished the title to two thirds of her was vested in the plaintiff, and one third in Talbot. In this situation she was taken to Louisville, to have the engine put in by the firm of Prentiss and Blakewell, engineers, and to be finally prepared for navigating the river.

When finished, a difficulty arose respecting the adjustment and payment of the account of the engineers. They had a lien on her, and refused to permit her to depart for New-Orleans, unless their claim was paid, or a conveyance made to them of one third of the boat. An arrangement was finally made between Hayden and them, by which

they received a conveyance of one third of the boat, and gave at the same time a counter letter, by which they declared that Hayden should have the right to rebuy or purchase back the said share, if within fifteen days after the arrival of the boat in New-Orleans, he paid to them the sum of $3000. Stone, the agent of the plaintiff, who had been sent by him to attend to the completion of the boat, protested against this conveyance, but from every thing we can discover it was a matter of necessity, and considering the defendant as the agent of the plaintiff, it appears to have been a prudent measure. The plaintiff too, subsequently ratified it.

Things being in this situation, the defendant attempted to put in command of the boat one Emmerson, but Prentiss and Blakewell, and Talbot, as owners of two-thirds, resisted this demand, and the person last mentioned, took the control and management of her, and descended the river to New-Orleans. Emmerson came down in her as passenger, with a power of attorney from the defendant, by which he was empowered on the receipt of the money due Prentiss and Blakewell, and the payment of the balance

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owing the defendant, to convey the two-thirds of the boat to the plaintiff.

The plaintiff attempted to make these payments, and after several negotiations he succeeded so far as to obtain from Emmerson, the agent of the defendant, a letter addressed to Captain Talbot in the following words: "Sir, I have disposed of the two-thirds of steam-boat Belle Creole, which I represent; she must be delivered free from cargo, or any engagements of that kind. It will likewise be necessary to furnish them with an inventory of cabin furniture, and all other apparel on board, as belonging to them." Talbot refused to deliver up the boat. She soon after left the port; and where she has since been, or what has become of her, the record does not inform us.

These as we understand, are the material facts to be gathered from the mass of confused, and irrelevant matter, with which the record is loaded. It will be seen from the statement just made, that the responsibility of the defendant turns entirely on the performance of his contract, express or implied, to convey the boat to the plaintiff on his arrival in New-Orleans. The plaintiff insists it was

the duty of the defendant to sell *and deliver* her. The defendant urges it was sufficient for him to make a conveyance of all his right and title, and if any ulterior steps were necessary to get possession, the plaintiff should have pursued them.

The defendant it is clearly proved, acted as the agent of the plaintiff through the whole transaction, as well before, as after the conveyance made to him, though it is shown, he considered he might become the absolute owner, unless the plaintiff would repay him his advances. But it is established that he was ready to reconvey the boat at any moment, not on the payment of the one-third of her value, but on the repayment of the money advanced, thus admitting he was but the trustee of the plaintiff, and not the real owner. The plaintiff chose to consider the defendant as his trustee, or agent, and as holding the boat for him. The defendant assented, and offered to reconvey. In carrying this contract into effect, the obligations of the parties must be sought in the characters in which they acted, and it appears to us, they can be considered in no other light but as princi-

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pal, and agent, for the agreement to reconvey was a performance of the obligations which the defendant as agent had contracted. If this view of the subject be correct, the defendant was not responsible for the non delivery of the boat. An agent, who in the discharge of his duties as such, takes by consent of the principal, a conveyance of property in his own name, while at the same time he is not the real owner, is not bound to sue for the possession of the property at his risk and expense, unless that possession has been lost through his fault. He fulfils his obligations, and discharges his duty, by offering to reconvey when called on. That, the defendant was prepared to do in this instance, and the plaintiff must impute it to his own fault, that he did not take the conveyance, and pursue the legal measures to obtain possession.

An agent, who in the discharge of his duties as such, takes by consent of the principal, a conveyance of property in his own name, while at the same time he is not the real owner, is not bound to sue for the possession of the property at his risk and expense, unless that possession has been lost through his fault. He fulfils his obligations and discharges his duty, by offering to reconvey when called on.

We are of opinion that there has been no act of conversion on the part of the defendant, which renders him responsible as owner of the boat for the moneys advanced by the plaintiff in her building.

And it is therefore ordered, adjudged and decreed, that the judgment of the parish court

be annulled, avoided and reversed, and that there be judgment for defendant as in case of nonsuit with costs in both courts.

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HOWARD & AL. vs. OWNERS S. B. COLUMBIA.

Dilatory exceptions must be plead in *limine litis*.

The amicable demand must be specially denied in order to put the plaintiff to proof of the fact.

APPEAL from the court of the first district.

The plaintiffs who were ship-carpenters, brought this suit to recover from the defendants, a balance which they alleged to be due them for work and labour, and materials furnished in repairing the steam-boat Columbia. The defendants denied that the work had been faithfully done. That the boat was unnecessarily delayed in the ship-yard of plaintiffs, by which heavy damages were incurred which they claimed in reconvention.

It appeared from the contract entered into between the parties, that a part of the stipulated price was to be paid as the work progressed, and the balance in three and four months after the boat commenced running, or after her repairs were completed. The boat left the ship-yard on Friday the twenty-eighth of October,

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1829, took in freight and went up the river the Sunday following. Suit was instituted on the second of November. It was proved that every exertion was used by the plaintiffs to expedite the work, that when the boat left the yard the repairs were complete except what was done by plaintiffs after she crossed the river, and that she left when she did, at the request of her captain who was anxious to take in freight. There was a verdict and judgment for the plaintiffs and the defendants appealed.

Duncan, for appellants.

1. The contract on which suit is brought shows that the plaintiffs were not authorized to bring their action at the period it was instituted. C. C. art. 2038, 2039.

2. There is error in the judgment of the court below in condemning the defendants to pay costs, no amicable demand having been made. C. p. 169; 8 Mart. n. s. 107.

Carleton and Lockett, contra.

The cause depends entirely on questions of fact, and the plaintiff relies upon the verdict of the jury.

MATHEWS, J. delivered the opinion of the court.

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This is a suit brought by a company of ship-carpenters to recover from the owners of the steam-boat Columbia, a balance which they alleged to be due to them for work and labor, and materials furnished in repairing said boat by contract with the proprietors. The cause was submitted to a jury in the court below, who found a verdict for the plaintiffs, on which a judgment was rendered with costs, and from it the defendants appealed.

The principal points filed in this court against the correctness of the decision of the district court, are,

First, that the suit was prematurely commenced as according to the terms of the contract on which the action is based, the defendants were not bound to pay the sum now claimed, until three and four months after the work was completed, or the boat commenced running; which time had not elapsed previous to the institution of the present action.

Second, That no amicable demand of payment was made, or proven to have been made, on the trial of the cause, &c.

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tory exceptions must be pleaded in *limine lites*.

The objection to a recovery by the plaintiffs, on the ground alleged in the first of these points, being a dilatory exception, ought to have been pleaded in *limine lites*, which was not done, and consequently no advantage can now be had from it.

As to the merits of the case which depend on the testimony, we find nothing on the record to authorize an interference with the verdict of the jury.

In relation to the amicable demand, it is believed that it forms no part of the merits of a cause to which a general denial is, perhaps, exclusively applicable. It may be considered as analogous to an allegation in a petition by which the capacity in which a plaintiff sues is declared. Such as executor, administrator, or heir, &c. which must be specially decreed, in order to put the petitioner on the proof of such fact.

The amicable demand must be specially denied, in order to put the plaintiff to proof of the fact.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

CHARDON vs. GUIMBLOTTE.

An appeal lies from the release of a debtor on a writ of habeas corpus in a court action.

The sheriff having refused to discharge the defendant after the order of bail had been set aside, the latter applied for a *habeas corpus* and was brought up. The sheriff showing no other cause for his detention, than the order of bail, (which had been set aside) the court ordered him to be enlarged, from which order an appeal was prayed for and refused. The judge having made return to the rule taken on him to show cause why a *mandamus* should not issue commanding him to allow the appeal prayed for.

Waggaman and *Miller*, for plaintiff.

MARTIN J. delivered the opinion of the court.

A rule having been taken on the judge of the first district to show cause why a *mandamus* should not issue, commanding time to allow the plaintiff an appeal in this case, he made the following return, as follows.

"A rule was taken on the plaintiff to show cause why the order of bail, obtained

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in this suit, should not be set aside: upon hearing testimony, the court was satisfied that the facts in his affidavit were disproved, whereupon the order of bail was set aside. From this decree the plaintiff prayed an appeal which was allowed.

The defendant being in custody, and the sheriff declining to discharge him, a writ of *habeas corpus* was applied for, in favour of the former, and on his being brought before the judge, and the sheriff showing no cause for his detention but the order of bail that had been set aside, the prisoner was discharged. From the order of discharge the plaintiff prayed an appeal, which was refused; the judge being of opinion that an appeal does not lie from an order on a writ of *habeas corpus*, which is a writ which may issue at chambers, and of which there is no record: besides, is is considered as issuing from the court here and is not a civil proceeding.

An appeal lies, from the release of a debtor on a writ of *habeas corpus*, in a civil action.

The constitution having provided appeals in all civil cases, in which the matter in dispute exceeds in value the sum of three hundred dollars, it is clear a party has a right to an appeal from any decision (in

such a case) which works an irreparable injury; and if an appeal lies from a decree made in open court, where the judge has the benefit of counsel, *a fortiori* when an order is granted at chambers, *ex parte*: as that order may have as fatal a consequence as any other: as in the present case, when a defendant, in custody on a debt of fifty odd thousand dollars, is released *ex parte*, and if there be no remedy, may instantly remove out of the state, and soon place himself beyond his creditors' reach.

On an application for a writ of *habeas corpus*, there must be an affidavit of the facts, a petition, an order thereon, a return and a decree. If these documents do not constitute a record, we are ignorant of what does, and we believe these documents ought to be filed in the office of the clerk of the court, the judge of which acts on the application.

The jurisdiction of this court being confined to civil cases, it would not entertain an appeal from a decree on a writ of *habeas corpus*, issued in a criminal case; and in Laverty's case, it declined acting on a writ issued in a *political* case, that of a native of Ireland, (during the war between the United States

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and the king of the three United Kingdoms of England, Scotland and Ireland,) arrested by the marshal of the United States, to be sent into the interior of the country. In that case another consideration may have had an influence on the decision of the court: the prisoner was in custody, under the authority of the United States.

In the present case, the defendant was arrested in a civil case; the plaintiff had interest to have his person arrested, for the security of a large claim. The order by which that of bail was set aside, worked to him an irreparable injury, and it enabled the defendant to remove beyond the limits of the state, and probably beyond his creditor's reach. The district court correctly allowed the appeal. This suspended the execution of the order setting the order of bail aside, and the sheriff very properly declined to set his prisoner at liberty. The writ of *habeas corpus* was properly granted, but in our opinion, the judge erred in liberating the defendant.

It is therefore ordered, adjudged and decreed, that the rule be made absolute.

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The rights of different creditors are to be examined in concurrence only in cases of actual insolvency, either by a voluntary or forced surrender on the part of a debtor.

No distinction exists between suits prosecuted in the ordinary mode by citation, and those which are pursued by attachment.

In a suit upon a bill of exchange, an amendment, changing the amount of the bill, is not altering the nature of the suit.

Amendments may be allowed after issue joined.

When a witness is to be examined on interrogatories, if an opportunity, as pointed out by law, be given to the adverse party to file cross interrogatories, notice of the time and place of taking the answers is not required. Therefore if the commissioner give an erroneous one, the mistake will not be fatal.

APPEAL from the first judicial district.

Suit, by attachment, was brought against the defendant, a merchant at Nashville, as drawer of a bill of exchange on a merchant of the latter place, and returned under protest for non acceptance. Several other creditors afterwards, brought suit, and the writs of attachment were levied on the same property that had been previously attached by W. A. Gasquet and Co. After the cause, which had already been before this court, was remanded, (see vol.

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8, n. s. p. 544,) the attorney appointed to represent the defendant, filed a general denial.

In the original petition, the bill of exchange was stated to be for the sum of five thousand four hundred and sixteen dollars and two cents, and *bearing interest after six months by agreement at the rate of six per cent. per annum*, making in all the sum of five thousand six hundred and thirty-seven dollars forty-seven cents.

An amended petition was afterwards offered, and allowed to be filed, which alleged that the bill had been erroneously described; that the *interest had been included* in the bill at the time it was drawn, and that it was drawn for the aforesaid sum of five thousand six hundred and thirty-seven dollars and forty-seven cents, being principal and interest.

Otis Loomer and Co. and the other creditors whose attachments had been levied on the same property on which the plaintiffs had attached, prayed to be allowed to intervene on the ground that the plaintiffs ought not to have been permitted to amend their petition, that the court erred in allowing this amendment, and that they were aggrieved by this decision inasmuch as the property attached was insufficient to dis-

charge the claims of all the attaching creditors, and that had not this amendment been allowed, the plaintiffs would have failed in their action. The plaintiffs denied their right to intervene. The court, sustained the objection, and dismissed the petition of intervention; from this decision the interpleaders appealed.

To prove the protest of the bill, and due notice to the defendant of its dishonour, the plaintiffs offered in evidence the deposition of a notary public, taken under a commission, directed to Nashville. The interrogatories to the witness had been served on the counsel of the opposite party, who had subjoined cross interrogatories. On the return of the commission it appeared, that notice of the time and place of executing the commission had been given by the commissioner to the defendant then at Nashville, but that the examination of the witness had taken place at a different time from that mentioned in the notice. The introduction in evidence of the deposition was objected to on the ground of this variance, and the deposition was rejected.

A witness on the part of plaintiffs testified, that he was present at a conversation between one of the plaintiffs and the defendant, in which

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the latter had observed that "he did not wish to oppose any obstacle to the recovery of plaintiffs' debt," and if he had obtained any preference by his prior attachment or execution, did not wish to interfere in the matter; that they were all just debts, and his wish and intention was to pay them all. He regretted the protest of the bill, and spoke of his absence as being the cause of it; said that plaintiffs had acted honorably, but that nevertheless he wished them to be paid."

The court *a quo* considered this conversation as an admission of the debt or a waiver of notice, and rendered judgment for the plaintiffs.

The defendant appealed. *Conrad* for plaintiffs. Contended that the court was correct in dismissing the petition of the interpleaders. He quoted on this point. Norris' heirs *vs.* Ogden, Mart. Rep. vol. II. p. 460—1. Clamageran *vs.* Brookes, and Hendricks et al. 4. n. s. 487. Pierre et al *vs.* Massa et al. 7. n. s. 196.

That the court erred in rejecting the deposition of the witness examined under the commission to Nashville. Cited Code Practice, art. 426, 430. Will *vs.* Jett, Mart. Rep. 6. n. s. 280.

That the expressions used by defendant in his conversation with one of the plaintiffs as detailed by the witness, were either a waiver of notice, or an admission that he had received it. Cited Baily on Bills, p. 320.

M'Caleb, for appellant.

The bill of exceptions taken to the opinion of the judge *a quo* in dismissing the opposition must be sustained. This is one of the very cases mentioned in the Code of Practice, where the opposing parties were claiming higher privileges than Gasquet and Co. upon the ground of prior attachments, and where they had reasons to fear injury would result to them. C. P. 389, 395. 391, 393, 5 M. n. s. 501.

The order for attachment was given by the *clerk*, when it is not shown that the judge was absent. C. P. 239, 780.

The amended answer should not have been permitted to be read; it changed the nature of the action. C. P. 171, 172, 260.

Slidell, for defendant.

MATHEWS, J. delivered the opinion of the court. This suit is by attachment, and brought on a protested bill of exchange which

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was drawn by the defendant, Johnson, in favor of the plaintiffs on Kyle and Orr of Nashville, Tennessee. Judgment was rendered in the court below for the plaintiffs, from which the defendants appealed.

The cause was one previous to the present appeal before this court. The judgment of the district court was then reversed, and the case remanded to be tried *de novo*.

The evidence on which the last judgment has been rendered in the court below, is fully spread on the record, to the admissibility of which several bills of exceptions were taken. But before examining them, or the merits of the suit; it is necessary to dispose of the claims and pretensions of certain intervening parties, Otis Loomer and Co. and others. The first attachment levied on the property of the defendant, was that of the plaintiffs Gasquet and Co. Afterwards the same goods were seized at the instance of other creditors, under attachments issued subsequently to that of the plaintiffs. Finding that Gasquet and Co. had obtained a preference on the property of the defendant, by the priority of their attachment, the other creditors then intervened with the avowed purpose of defeat-

ing the action of the original plaintiffs, and allege various errors in the proceedings by which it was carried on. The first question to be settled in relation to these parties, is whether they have a right to intervene? To show that they have, their counsel relies on the provisions of the Code of Practice, on the subject of intervention or interpleading, art. 389, declares "an interventor or interpleader to be a demand by which a third person requires to be permitted to become a party in a suit between other persons; either by joining the plaintiff in claiming the same thing or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff." Art. 390, "In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit." This we suppose must be a direct interest by which the intervening party is to obtain immediate gain, or suffer loss by the judgment, which may be rendered between the original parties; otherwise the strange anomaly would be introduced into our jurisprudence, of suffering an accumulation of suits in all instances where doubts might be entertained, or enter into the ima-

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gination of subsequent plaintiffs, that a defendant against whom a previous action was under prosecution, might not have property sufficient to discharge all his debts. For as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors down to the last would have an indirect interest in defeating the action of the first. This certainly was not the intention of our legislators. The rights of different creditors are to be examined in concurring only in cases of actual insolvency, either by a voluntary or forced surrender on the part of a debtor.

The rights of different creditors are to be examined in concurrence only in cases of actual insolvency, either by a voluntary or forced surrender on the part of a debtor.

It is true, that in cases of attachments, a contention and scuffle, for the property of the debtor, takes place among the attaching creditors, very similar to that which occurs in a *concurso*; but the rules by which these two species of judicial proceedings are governed, differ from each other. In relation to legal procedures against debtors not known to be insolvent, no sound distinction exists between suits prosecuted in the ordinary mode by citation, and those which are pursued by attachment. We therefore conclude that

No distinction exists between suits prosecuted in the ordinary mode by citation, and those which are pursued by attachment.

the intervening parties had no right to interfere in the manner by them attempted in the present case, and that their petition ought to have been rejected in the first instance; and here deserves no further notice.

The first objection made on the part of the defendant, to the correctness of the proceedings which took place in the court below, is to the permission awarded to the plaintiffs to amend their petition. His counsel insists that this amendment was illegally permitted on two grounds. 1. That it changed the nature of the action. 2. That according to the Code of Practice amendments are not allowable until after issue joined. As to the first of these grounds it is wholly untenable. The suit was brought on a bill of exchange, and in declaring on it, a mistake was made as to the amount for which it had been drawn. An amendment by which this mistake is rectified, most clearly produces no change in the nature of the action. The second ground of defence assumed against the admissibility of this amendment, appears so novel, that it might be well passed unnoticed, were it not for the indefinite manner in which the subject of amendment is treated by the

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Code of Practice. It begins by stating, art. 419. "After issue joined the plaintiff may, with the leave of the court, amend his original petition," &c. As no proviso is made for amendments previous to the *contestatio lites*; it is contended that they are excluded from our practical jurisprudence. Previous to the promulgation of the Code of Practice, a court in the exercise of its discretion could allow amendments to a petition before issue joined, and such right of amendment awarded by law is certainly more reasonable, than that in virtue of which a petition is permitted to amend after a *contestatio lites*. It is impossible to believe that the legislature by the grant of a right, less just and reasonable, intended to abrogate one more fully sanctioned by a convenient, correct, and reasonable mode of judicial proceedings. The provisions of this *art.* of the *Code*, do not in our opinion present a case to which the maxim *expressio unius, est exclusio alterius*, is applicable. The amendment of the petition in the present suit was therefore properly allowed.

Amendments may be allowed after issue joined

The only bill of exceptions in the cause which requires examination, according to the

opinion which we have formed of it, is that which relates to the rejection of the testimony of the notary public in Nashville, taken by interrogatories. It appears that the commissioner who was authorized to take the testimony of the witness, and certify his answers to the interrogatories which had been proprounded by both parties to the suit, through the agency of their attorneys, gave notice to the defendant of the time and place where the examination would take place. The certificate of the commissioner that the deposition of the witness was made under oath, and duly subscribed by the deponent, bears date on the twenty-eight of September 1829, but refers to the caption of the proceeding for the time and place, at which his testimony was taken; which seems to have been on the twenty-fifth of the same month, three days previous to the period at which the defendant had notice to attend. In consequence of this apparent irregularity in taking the testimony of the witness, it was rejected in the court below. We think this proceeding was erroneous. According to the rules prescribed by our Code of Practice, when a witness is to be examined by commission on

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interrogatories, if an oportunity as pointed out by law be given to the adverse party to file cross interrogatories, notice of the time and place of taking the answers is not required. See *art.* of the C. P. from 426 to 430.

In the present instance, interrogatories were filed on the part of the defendant, and answered by the witness, and should it be admitted that the examination took place on a day different from that mentioned in the notice to the defendant, this circumstance ought not to prejudice the plaintiffs.

The notice was an act of mere supererogation on the part of the commissioner, and cannot do injury to those things which were legally done. But by a comparison of the date of the certificate, with that of the caption, it is probable that the latter was put down in error as being the twenty-fifth of the month, instead of the twenty-eight.

Admitting however the legality of the manner in which the commission was executed; it is contended that the testimony does not prove due notice of the dishonor of his bill was given to the drawer, the present defendant. The deposition or answers to the interrogators, seems to have

been written by the notary himself. After stating that he presented the bill of exchange to the drawers for acceptance, on the eleventh of June 1829, and their refusal to accept; he proceeds thus: "whereupon, I did as notary public, on the said eleventh of June, one thousand eight hundred and twenty-nine, enter protest against the drawer, &c. and gave notice thereof to said James J. Johnston, drawer, &c." Now according to a sound grammatical interpretation of this sentence, it is evident that notice was given to the drawer of the bill on the same day of presentation and protest, and this is certainly legal notice. This testimony admitted makes the case clear in favor of the plaintiffs, and renders unnecessary any further examination.

It is therefore ordered, adjudged and decreed, that the judgment of the court be affirmed with costs.

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The proceedings of a family meeting are valid, although written and recorded in the French language.

Cant 1845 art 103
4 M 450
6 M 665
9 M 325
7 M 409
10 M. 1.
Act 1822 p. 46
See 8.
~~4 L 138~~

APPEAL from the court of probates of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. This is an appeal from a decision of the court of probates, rendered so far back as the year 1819, which adjudicated to the mother of the appellants, an estate that was common property between her and them. The minority of several of the appellants, has enabled them to bring it up at this late day, and they allege as error apparent on the face of the record, that the process verbal of the family meeting, on which the adjudication was made, is written in the French language.

It was desirable on every consideration, that a question on which the title to such a large portion of property in this state depends, had received a full examination from the bar; but it has pleased those who had the management of the case, to submit it for our decision without argument; we are

therefore compelled to decide it by such lights as our own understandings, and research may furnish.

According to a provision of the constitution of this state, all judicial proceedings are to be conducted and preserved in the language in which the constitution of the United States is written. It is now too late to enquire into the policy or wisdom of introducing such a provision into the constitution. It is there, and must be obeyed. It was one of the conditions too, on which Louisiana was admitted into the Union, and superadded to the solemn obligation imposed on all public functionaries to obey, and give effect to the fundamental law of the state: we have in regard to this particular provision, the obligation of being bound in good faith to others, to do that which the people of this state through their Convention covenanted with the United States they would do.

Impressed, I hope, with a proper sense of the magnitude and weight of these obligations, I have given to the case now before the court a more than ordinary degree of attention.

It is eighteen years since the territory of Orleans was erected into a state, and this is

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the first time the question which the present appeal presents, has come before the court in such a shape as to require it to be decided. But other causes have been adjudicated on, bearing a greater or less analogy to that before us, which it may be well to pass in review before entering on the considerations which are particular to the case now presented for decision.

Immediately after the adoption of the constitution, a question arose under the clause in the constitution already alluded to, and it was presented to the superior court of the late territory, which at that time had not been superseded by the state tribunals. It was there decided that a *mittimus* in the French language was void. According to the report of the case, it appears to have been acted on without much argument, and indeed it does not appear susceptible of any: as an order emanating from a court of justice, committing a criminal to jail, is clearly and emphatically a judicial proceeding. 2 *Martin*, 277.

The next case in which the question was presented, was that of *Dussau's syndics* vs. *Bredeaux*. The court there held that a creditor who had not opposed the homologation

of the proceedings of the creditors before the notary, nor appealed from the decree, could not avail himself of the process verbal being written in French. The judge, (Derbigny,) who delivered the opinion said: "We incline indeed to think, that the acts of creditors convened by a court of justice, are part of the judicial proceedings, which should be recorded and conducted in English."

In the case of *Tregre* vs. *Tregre*, the court waived the question as to the necessity of the deliberations of a family meeting being in English, but decided that the acts of the judge decreeing an adjudication was a judicial proceeding, and must be in the language in which the constitution of the United States was written. 6 *Martin*, 668.

The subject came again before the court in the case of *Viales' syndics* vs. *Gardner*, and it was then decided, that when the proceedings of creditors before a notary were returned into court, and made its judgment that they must be in the English language, no judgment appeared on record but the proceedings drawn up in French, and a judgment being a judicial proceeding could not be in that language. 9 *Martin*, 324.

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In the case of *Diltman* vs. *Hotz*, on an appeal from a judgment refusing to homologate an award, a similar decision was made, and similar reasons given for it. The court said that under the law as it then stood, no power was conferred on the judicial authority to render judgment on the award: all that could be done was to place it on record and order its execution, and that it could not be placed there as a judgment unless it was in the English language. A distinction, however, was taken and recognized between that which was evidence on which the court decided, and that which was a judgment. It was said in the opinion delivered in that case: "if the award is merely the evidence on which judgment is to be rendered, it may be written in any language the parties choose to adopt." 9 *Martin*, 200.

In the case of *Durnford* vs. *Segher's syndics*, it was held that the proceedings of creditors in a *concurso* carried on in the French language were voidable. That case presented the same question as that of *Diltman* vs. *Hotz*. The deliberations appointing syndics, do not require to be homologated. Their decision stands therefore when returned into

court as its judgment; and hence it follows, these deliberations must be in English. No judgment can be pronounced on the tableau, but that of homologation if it be approved. and as was said in *Viales' syndics vs. Gardner*, the homologation has no other effect than to place what is homologated on record as the decree of the court. 7 *Martin*, 400.

In the case of *Tilghman vs. Dias*, an objection was made to an order of seizure and sale, issuing on an authentic act, executed in the French language. The court decided against the objection, and held; *first*, that it could not be considered as one *of the public records of the state*, which the constitution required to be in English, and *second*, that it was not a judicial proceeding; it was the evidence furnished to obtain judgment, 12 *Mart.* 691.

The petition praying for an adjudication of the property in the instance before us, is in English, and the judgment in that petition is in the same language. It is in these words: "*Let the deliberations of the minors Maxent's family hereunto annexed, be approved, and registered, and let the property within mentioned be adjudicated to the petitioner, at the*

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price of its valuation in the inventory, as it is decided by said deliberation.

It is thus seen, that the case before the court is different from any yet decided by it. The judgment here is in the constitutional language. In the cases already mentioned, which bear the closet resemblance to this, the decrees were not pronounced in English; the proceedings in French were made the judgment of the court, or when presented for approval, they would have become so if homologated. The question is therefore open on its merits, and we are at liberty to examine it, not indeed entirely uninfluenced by the cases already decided, but certainly uncontrolled by them, for though in some respects alike, they are far from being the same.

That question is, whether a judgment pronounced in English, adjudicating property, where the deliberations of the family meeting have been conducted, and recorded in French, is null and void? I feel it to be one of considerable difficulty, and I know it to be one, in which a great, and I am convinced an honest diversity of opinion exists. This is not surprising. Men will

be found to differ on this, as on almost all questions of general importance, where there is the least room for it, and more especially on those where political objects are to be attained by legislation. Nothing has such a tendency to warp and bias the mind, and confuse our researches after truth in legal questions, than the combination of such matters, and men who think they reason solely on the subject as one of law, will insensibly to themselves, differ in their conclusions, from the different views they take of its policy. Independent of this consideration, they will differ, too, unconscious of the cause, from temperament, cast of thought, habits of viewing legal questions: and in this instance perhaps from the language they speak. The sects which have always divided jurisprudence, exist here as in every other community. One class will interpret the terms *judicial proceedings*, *lato sensuo*, the other *stricta sensu*, and thus arrive at directly opposite results. One, viewing the object contemplated by the constitution as of vast importance to the best interests of a people, who forming part of a government, do not speak its language, will pre-

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fer, and naturally come to think right, that construction which in a measure compels a state of things, they consider beneficial. Another, considering the desired end, retarded, rather than advanced, by any thing which carries with it an air of compulsion, who believe that the object sought for, will be best attained, by trusting to time, and the influence of causes, which cannot fail of their effect unless prejudices are aroused against them, will leave to, and finally adopt that interpretation, which leaves the matter as much as possible to the will of the people, who are to gain, or to suffer by it.

Whether any of these considerations have operated in my mind is more than I can say. Perhaps they have. But if they have, it is unconsciously, for my aim has been, in common I am sure with the other members of the court, to seek for the true intent and meaning of the framers of the constitution.

Perhaps it would be correct to say, that nothing can be considered judicial proceedings, but writs, citations, pleadings, interlocutory orders, judgments, and executions. But definitions are dangerous, and it is better and

safer to say what is not, than what is a judicial proceeding. It is material in my view of the case, to examine whether the evidence given in a cause can be considered such, and I do not think it can. It is not a proceeding *of* justice, but that *on* which judgment is formed and pronounced, and when it consists of written documents, it exists independent of, and previous to the suit in court. It could not have been the contemplation of congress when they proposed this condition, and *I am sure* it was not understood by our convention when they accepted it, that the people of this state were to cease at once using their own language for all written contracts, on pain of their being null and void. Such an idea cannot be harbored for a moment. If then the evidence need not be in the English language, is there any necessity for translating it into that language before it can be used; and is the judgment null and void where it does not appear on record, that this formality was pursued? I think not, because the evidence is not a judicial proceeding, but the matter on which proceedings are had.

On this branch of the question I have no doubt; but I have serious doubts, whether

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the deliberations of a family meeting can be considered as mere evidence in the cause. The act under which the adjudication took place, is in these words: "When the legitimate father or mother of a minor, has an estate in common with said minor, said father or mother may cause either the whole, or part of said estate to be adjudicated to him or her by the judge, according to the estimated value of the inventory, provided this estimation has been made by appraisers duly sworn, and provided likewise said adjudication be decreed convenient to the interest of the minor by the assembly of the family, and provided moreover the same has been assented to by the under tutor," *Mart. Dig.* 127, 128, *no.* 3.

By this enactment it appears, that the sentence of adjudication is pronounced on three things: the estimation being sworn to; the assent of the under tutor; and the advice of family meeting. And hence it may be said, that all, and each of these things, are the evidence on which the judge acts, when he decrees that the property shall be adjudicated. As however the family meeting give their advice and opinion to the judge, which advice

and opinion must be formed on all the circumstances that could render such a measure proper; there is considerable force in the position that they are by law made assistants to the judge in pronouncing his decree, and that their deliberations form a part of the judicial proceeding. In opposition to this it may be said, that their functions cannot be distinguished from that of witnesses skilled in a particular art, or profession, who give their opinion to the court on other evidence, and on which opinion the court acts in pronouncing judgment. On the other hand, the deliberation of the family meeting, and the conclusion to which it arrives, bear a considerable analogy to the deliberations of a jury who hear the evidence, and give a verdict, on which the judge pronounces judgment. But the weight due to this last consideration is greatly diminished, by reflecting that juries are made by law a tribunal for the trial of facts; that when called on for that purpose, they take the place of the judge; that the trial is in open court; that in criminal matters the verdict is conclusive in favor of the prisoner; that when they decide the judge does not weigh the testimony. While in the case of

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an adjudication of minors' property, he comes to his conclusions not on the advice of the family meeting alone; but on that and other evidence, viz. the inventory and appraisement being sworn to, and the consent of the under tutor. That there is no more reason for not considering the deliberations of the family meeting evidence, than there would be to declare, that the assent of the under tutor, and the proof of the appraisement being sworn to, was not.

It cannot escape the attention of any one who reflects on this subject, that if the deliberations of a family meeting is considered a judicial proceeding, a most embarrassing consideration would arise in relation to another matter of daily occurrence in this state. We have the executory proceeding, by which an order of seizure and sale, may at once issue on a mortgage by authentic act, executed before a notary. Our law regards this as equivalent to a confession of judgment. We have decided that a judge in giving an order on it, acts judicially. 12 *Mart.* 691. If the family meeting be a judicial proceeding, it will be hard to draw the line between it and the act before the notary. Now though a case has

been brought before the court, where this question was mooted, I do not believe that it was ever seriously doubted, that acts before notaries in the French language, had not the same force and effect as if they were written in English; the belief has been almost universal, that they were nothing more than evidence, on which the court might pronounce judgment, and order execution.

I have thus thrown together the different reasons which have occurred to me in the examination of this question, why the advice of a family meeting should and should not be considered a judicial proceeding. If the subject was presented to me without the aid furnished by the opinion which the other branches of the government have expressed on it, I should have strong doubts, though the leaning of my opinion is, that it partakes more of the character of evidence, than any thing else. But the act of the legislature cannot be excluded from consideration, and the constitution has to be interpreted not by itself alone, but with the statute passed in relation to it.

In the year 1822 the legislature of this state passed an act, by which they in substance

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declared, that the deliberations of a family meeting were not judicial proceedings: because in the act it is provided, that the process verbal of a family meeting shall be as legal and binding on the parties, as if made and executed in the language in which the constitution of the United States is written.

That this act cannot control the case now under consideration unless it be constitutional, is a truth which requires no reasoning to enforce, and I trust the day is distant when it will be necessary to prove it. But though a law of the legislature can never make that constitutional which is not so in truth, it must exercise a powerful influence in deciding whether it be constitutional or not. The opinion of the legislative and executive branches of the government, sworn like the judiciary, to maintain the constitution, acting under every obligation which duty and conscience can impose, is certainly a strong, though not a conclusive reason to induce others where the case is not clear, to adopt their construction as correct. It has all the weight which authority, independent of reason, can have in any case. And if the subject be one on which doubt exists, it is the duty of the other

branches of the government to adopt the construction: the peace of society emphatically requires it.

I have looked, I believe, into all the cases which are reported to have come before the courts of the different states of the Union, and those of the United States in regard to the constitutionality of laws, and I find the principle just alluded to, has universally been admitted, and uniformly acted on. It is unnecessary to cite all these cases, or quote the language of the distinguished men who have been governed by this consideration. So early as the year 1798, judge Chase said, I never will decide any law to be void *but in a very clear case;* and the present chief justice of the United States, in delivering the opinion in the case of *Dartmouth College* vs. *Woodward*, observed: "On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." From every thing I can discover, I believe this principle to be as firmly established, as the right of the judiciary to pro-

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nounce a law unconstitutional. 3 *Dallas*, 395; 4 *Wheaton*, 624.

I am doubtful in this instance, whether the law under consideration be unconstitutional, and I cannot pronounce it so. If the doctrine just stated be true, there never was an act of a legislature to which it can be more cheerfully applied. The statute interferes not with mens' contracts: it destroys no vested rights: it impairs not the protection due to property: nor violates personal security. It is in furtherance of justice: to quiet men in their estates: to protect the citizen in the possession of that which he has honestly acquired; and to prevent it being wrested from them on technical objections.

And this brings me to a consideration of great importance, and which I acknowledge has as much weight on my mind as the act of the legislature. It is now 18 years since the constitution was formed. During all this time it has been universally believed that meetingsof families might be conducted in the language of the persons called to deliberate on the affairs of minors. I believe it is not an exaggeration to say, that every twenty-five years, nearly all the property of the state pas-

ses through the court of probates. A large portion of it has been settled by proceedings similar to those now before us, and a decision pronouncing them void would produce the most disastrous effects on the best interests of society. Litigation to a frightful extent, could not fail to follow a declaration on our part, that they were void. Litigation too in its most odious features, where the endearing ties of blood and friendship, would be sacrificed to cupidity: where brothers and sisters would be seen arrayed against each other, and children against their parents. No one can contemplate such consequences without pain, and nothing short of an absolute conviction on my mind, of the proceedings of the family meeting being clearly a violation of the constitution, could induce me to scatter the seeds of discord through the state and sow them in the bosom of families. The case before is a sample of what would follow. We have here presented the disgusting spectacle of children, for the sake of a little property, accusing their mother of misconduct, and dragging before a court of justice, the being to w hom they are indebted for life.

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The importance of all constitutional questions is my reason for going so much at length into this. In concluding, I wish to state, that if the law was clearly unconstitutional, I do not think the continuance of the error for any length of time could render it valid. It appears to me that the implied assent of the other branches of the government which sanctions mistakes in relation to laws, cannot have any effect in constitutional questions, for they have no power to dispense with the fundamental law of the state. But it is unnecessary to enter fully into this subject.

My opinion is that the judgment of the court of probates be affirmed.

MARTIN, J. The defendants are appellants from a decree, approving the process verbal of the deliberations of the family meeting, and adjudicating to the plaintiff the property therein mentioned, common to her and the defendants her children.

Their counsel has assigned as errors apparent on the face of the record, that

1. The proceedings of the family meeting by virtue of which the whole estate was de-

creed to be adjudicated to the appellee, at the price of the appraisement, are null and void: the same not being written in English.

2. That the proceedings (being a public act) ought to have been attested by two witnesses.

The case has been submitted to us, without any argument.

1. By a provision of the constitution, "all judicial proceedings are to be conducted and preserved, in the language in which the constitution of the United States is written. *Section* 15. *art.* 6.

I remember but five decisions of this tribunal which cast any light on the question we are now called on to solve.

There is, however, one of the superior court, before the organization of the judiciary of the state, according to the constitution. It is that in Macarty's case, 2 *Martin*, 278; it was there held, that a mittimus, written in the French language was null and void.

This court was first called upon to act on the question in the case of *Dussuau's syndics* vs. *Prideaux*, 4 id. 451; we then decided that a creditor, who had not opposed the homologation of the process verbal of the

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deliberations of the meeting of the creditors before the notary, could not avail himself of the circumstance of the document, being written in the French language. We then said that we inclined to think that the proceedings of creditors, convened by a court of justice, are a part of these proceedings, the whole of which forms what is known to the Spanish law as the *juicio de concurso*; as the constitution requires that all judicial proceedings should be conducted and preserved in the language in which the constitution of the United States is written, we are disposed to believe, that if the objection had come from a party who had not concurred in, or adhered to the proceedings complained of, it would be our duty to declare they are not legal.

The next case was that of *Tregre* vs. *Tregre*, 6 id. 668. We then held that the proceedings of a judge of probates, proceeding as such, to the partition of an estate, and decreeing the adjudication of it, were stamped with the character of judicial proceedings, and it was our duty to declare that, unless they were written in the English language, as the constitution requires, they were void.

The third was the case of *Durnford* vs. *Segher's syndics*, 7 id. 409, which was an appeal from a judgment of the court of the first district, setting aside the proceedings of the meeting of the creditors, because they were written in French. In affirming the judgment we said, the proceedings set aside are judicial proceedings; they are ordered by the court, and constitute a part of the proceedings, instituted by the debtor against his creditors, and are the basis of the judgment which terminates them. They are therefore some of the proceedings, which the constitution requires to be conducted and preserved in the language in which the constitution of the United States is written.

The fourth is the case of *Dittman* vs. *Hotz*, in which we expressed our clear opinion, that whenever one of the parties, who have submitted their case to arbitrators, applies to a court of justice to have their judgment to make the award valid, which the party presents for homologation, it must be written in the language which the constitution requires; otherwise it would not judicially appear on the records of the court, by virtue of what sentence or judgment execution was awarded.

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Lastly, is the case of *Viales' syndics* vs. *Gardner*, id. 324. This was an appeal from the judgment of the court of the first district refusing to acknowledge the plaintiffs' capacity as syndics, because the process verbal of the deliberations of the creditors before the notary, were written in the French language. The proceedings had indeed been homologated, but no part of them was recited, nor was any mention made of the plaintiffs' appointment as syndics, in the judgment of homologation. We said "to homologate is *omos logos, similiter dicere*," or to say the like. The case cannot be put on a footing more favourable to the plaintiffs, than by considering it, as if the whole proceedings before the notary had been *verbatim* and *literatim* transcribed in the judgment. Had this been the case, we would be bound to consider the part of the judgment written in the French language as a nullity: and if what is on this record, written in the French language be disregarded, nothing shows that the plaintiffs were appointed syndics. The judgment of the district court was affirmed.

According to these decisions, it appears that the process verbal of the deliberations

of the meeting of an insolvent's creditors, and an award of arbitrators were considered by the judiciary power of the state as judicial proceedings; and consequently were of no validity, unless conducted and preserved in the language in which the constitution of the United States is written. Whether the process verbal of the deliberations of a family meeting were to be considered in the same light, was a question which does not appear to have been brought.

The legislature was now pleased to enact that no process verbal of any family meeting, no written instrument containing the deliberations of any meeting of creditors, no decision or award of arbitrators, that may have taken place previous to the date hereof, or may take place hereafter, shall in any way whatever be attacked or invalidated, on the ground that it may have been made, executed or drawn up in the French language; but on the contrary, any process verbal of the deliberations of a family meeting, any act containing the deliberations of meetings of creditors, any decision or award of arbitrators, which may be made or executed in the French language, shall be quite as legal and

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binding upon the parties, as if the same had been made or executed in the English language. *Act of March* 16, 1822.

It has appeared to me that the present case may be disposed of, without inquiring into the force and effect of this act of the legislature. Allowing to the appellee every benefit he may attempt to draw from it, the decision of the court in the case of *Tregre* vs. *Tregre* is unshaken. The proceedings of a judge of probates decreeing the adjudication of an estate, are stamped with the character of judicial proceedings, and it is our duty to declare that unless they be written in the English language, as the constitution requires, they are void.

Neither is our decision in the case of *Viales' syndics* touched, and the present case, according to it, "cannot be put on a footing more favourable to the plaintiffs than by considering it as if the whole proceedings of the family meeting had been *verbatim* and *literatim* transcribed in the judgment." Had this been the case, we would be bound to consider that part of the judgment as a nullity: and if what is written in the French language on the record be disre-

garded, nothing shows what land is adjudicated. The decree is in the following words: "Let the deliberations of the minors Maxents' family, hereto annexed, be approved and registered, and let the property within mentioned be adjudicated to the petitioner, at the price of the valuation in the inventory, as is described by said deliberations." Now, if in the case of *Viales' syndics*, (whose appointment resulted from the homologation or approbation of the deliberations of the creditors, written in the French language,) could not establish their capacity, because the document referred to in the judgment of homologation, being in the French language, had not the character of *judicial* proceedings; how can the appellee establish what land was adjudicated to her, and what are the directions of the deliberations of the family, while these lands and directions are not stated in the judgment, nor in any part of the *judicial* proceedings of the case?

It appears that the judgment is erroneous, because it does not show what land is adjudicated, nor what are the directions of the deliberations of the family meeting. This omission, indeed, would be cured, if this

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appeared by any part of the judicial proceedings. As we held in the case of *Witman's heirs* vs. *Duhamel*, a judgment must be certain, but if it does not appear so on its face, it suffices if it appear to be so by a reference to the judicial proceedings in the case. If that certainly appeared only from a recurrence to the evidence, I think the judgment would be incomplete; for the evidence is not always conclusive, and it is a judicial process to extract the evidence from a mass of testimony and instruments of writing; if a reference in any case be to a particular piece of evidence, I think it should necessarily be to a piece of evidence, written in the language in which judicial proceedings are to be conducted and preserved.

The other members have formed an opinion, which is about to become that of the tribunal: it is my duty, as I do not perfectly assent to it, to state my view of the case.

The family meeting, in a case like the present, is the assembly of the minors' kindred, to whom the law requires a judge of probates to refer the main question of fact:

i. e. whether it comports with his interests, that his part of the property common to him and the surviving parent be adjudicated to the latter, at the price of the appraisement. This finding is the *basis* of the decree, which puts an end to the action or suit instituted or commenced by the parent's petition to have a family meeting called; the order of the judge therefore, the citation to the members of the meeting; the process verbal of their deliberations; the citation to the under-tutor, if he does not appear at the meeting; the petition to have the adjudication made according to the deliberations; and the judge's final order appear to me essential *judicial* proceedings.

In case of insolvency, the debtor institutes or commences an action against all his creditors, in order to obtain a respite or their acceptance of the cession of his property and his discharge from liability to imprisonment. His petition, the order of the judge thereon; the citation of the creditors to the meeting; the process verbal of the deliberations of the creditors, &c., appear to me judicial proceedings, terminating by the final judgment.

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The process verbal of the deliberations of the creditors is the basis of the consequent decree, and is part of the judicial proceedings which precede it.

Such have been my impressions, when I joined my colleagues, in the judgments I have cited. I confess they were unchanged when the act of 1822 was promulgated. It is now my duty to see whether it presents to courts of justice a legitimate rule of action.

Its object appears to have been the gratuitous one of explaining the fifteenth article of the sixth section of the constitution, to remove from its influence certain documents, which repeated judgments of the inferior courts, affirmed by this tribunal, had declared within it. The act was expressly declared to have a retroactive effect. It appears to me the gratuitous exposition, interpretative and constructive explanation of the constitution are not legitimate objects of legislation.

The exposition, explanation, or construction, given to any part of the constitution, on which they are legitimately called upon to act, will command the respect of citizens and magistrates, as the opinion of the

first branch of government, drawn forth in the exercise of its legitimate functions, *e. g.* in a late contest the decision of the senate and house of representatives, as to the president of the senate, appointed last January, must command the respect of the judiciary, because the houses were by certain circumstances called upon to determine whether, on the death of a governor, his functions, till another was elected, devolved on the president of the senate *for the time being*; or solely on the president of the senate, at the period of the governor's death. The constitution imposing on the houses the duty of acting on the question, when it arose, vested them with the power of determining it.

The opinion of the supreme court of the United States, expressed in the legitimate exercise of its functions, the pronouncing judgments between suitors, affords a legitimate construction of the constitution and laws of the United States, which will command respect and obedience from every tribunal in the nation; but if its opinion was given not as a judgment, but as the former parliaments of France used

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to do, *par voie de réglement*, it would have no binding authority.

I conclude that I cannot change the opinion I have formed or expressed in assenting to the decisions I have cited, merely because it has pleased the legislature to express a contrary opinion.

But although the act of the legislature, *per se*, does not seem to me to have any force, yet I must reflect that their view has been that of a great majority of the judges of probates in this state, ever since the operation of the state government; and since the promulgation of the act, many judges have believed it afforded them a legitimate rule of action.

The members of family meetings, being the relations of minors, are generally of the ancient population of the country; few of whom understood any language but the French; they would have refused their signatures to a document couched in a language unknown to them. The practice of drawing process verbal of their deliberations generally during the ten years, which preceded the act of the legislature, has become almost universal during the eight years that followed it. A

vast number of estates have been settled and adjudicated in this way. Property to an immense amount has had innumerable mutations. The state must be thrown into the utmost confusion and disorder, by our considering the process verbal of the deliberations of family meetings, as within the influence of the fifteenth section of the sixth article of the constitution.

And we must adopt the course we pursued in 1815, when we were pressed to declare, that the office of special administrator which had been in operation for eleven years, had no legal existence, in the case of *Rogers* vs. *Buller*, 3 id. 665. We then said, "Till the institution of the present suit, during the whole territorial government, no doubt appears to have ever existed of the constitutional and legal existence of the office: many estates, since, of great value, have been settled by the special administrator. It would be attended with monstrous inconveniences, if by declaring now that the office never legally existed, the court was to annul all the transactions of the various incumbents, who have filled it." We then referred to a similar decision of the supreme court of

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the United States, in *Stuart* vs. *Laird*, 1 *Cranch*, 309.

II. The family meeting was held before a justice of the peace, and his return like that of a *dedimus potestatem*, did not require the subscription of any witness.

Under these impressions I deem it my duty to conclude, that we ought not to admit the objection, that the process verbal of the family meeting was written in the French language.

But on the ground I first took, I think the judgment of the court of probates should be reversed, and the judgment made certain, by stating in the judgment, what land is adjudicated, and under what directions, if any.

MATHEWS, J. This case offers but one question for solution. It is however of great importance as involving a constitutional interpretation, which will have a serious effect on many titles to property obtained under the administration and disposal of numerous successions.

The views which I have taken of the subject, bring me to the same conclusion to which the other members of the court have arrived; *i. e.* that the proceedings of family

meetings are not required to be in the English language. Whether in coming to this result, I shall adopt the course of reasoning of either of them, or express myself contented with both or either, is not a matter of importance to the public; as by this decision the question is to be finally settled, and in such a manner as to relieve the anxiety, and quiet the fears of many of our fellow-citizens, who hold property under titles sanctioned by the proceedings of family meetings in French. I am however of opinion, that the proceedings of a family meeting (which generally takes place out of the presence of the judge, who convokes it,) are not, strictly speaking, judicial proceedings. I consider them rather as a mode pointed out by law, in pursuance of which a court of probates is to obtain testimony as to the propriety of adjudications to a surviving father or mother, the property of minors held in common with such saving hand. It is perhaps a mean by which something is substituted for the consent of the co-proprietors, who are of an age which incapacitates them to give any themselves; considered in other points of view, the deliberations of a family assembly, are not

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direct judicial proceedings. They are not a petition, an answer, or a judgment. They perhaps are more analogous to an answer than any thing else in immediate judicial proceedings, but certainly cannot be considered as such. The purpose of an answer is, either to deny or admit the allegations of a petition. In the case of an application made by a surviving father or mother, to have property adjudicated to him or her, which is common between the applicant and minor children; the law makes a denial by presuming that such adjudication would not benefit the minors: and their relations or friends are called on to prove that it would be advantageous, and on this proof the judge orders and decrees. The question is by no means free from doubt, when we consider that the determination of the family meeting is absolutely essential to the adjudication. If the intention of the convention be not clearly expressed by the words of the constitution, if it is to be ascertained by interpretation, I suppose the consideration of public convenience may be legally taken into view, in endeavouring to discover their intention and meaning. The inconvenience to a very large

portion of the population of the state, by requiring the proceedings of family meetings to be in English, cannot be denied by any one; nor is it easy to perceive any general benefits which could result from such a requisition. But the words taken in their most extensive signification do not in my opinion include the mere deliberations of the friends of minors, whose property is about to be adjudicated. They make no integral part of the decree of adjudication, although they form the basis on which it is made, like evidence in any other species of suits. They are not necessarily homologated by the decree in such a manner as to become a part of the judgment. In themselves they adjudge nothing; in this respect they differ from the proceedings of creditors in a *concurso*, whose appointment of syndics is identified with the order of homologation.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.